



**Identitás
a jogban**

Identity, Belonging and the Law

András László Pap et al. (eds.)

TÁRSADALOMTUDOMÁNYI KUTATÓKÖZPONT
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Identity, Belonging, and the Law. Agency, proxies, contestation, legal, and practical challenges to conceptualizing and operationalizing groupness, and membership for national minorities, indigenous peoples, race, ethnicity, and religion

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for national minorities, indigenous peoples,
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Identity in Law

The research was carried out and the book was published in the framework of No. 134962 Hungarian National Research and Innovation Office Grant on Legal approaches to operationalize nationality and ethnicity.

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András L. Pap

Legal challenges in defining minority communities and membership: overview and introduction

1. Subject and context

This book is a collection of essays produced under the auspices of a 5-year Hungarian Research Fund Grant project on legal approaches to operationalizing nationality and ethnicity.¹

Inspired by the lack of legal certainty and inadequate legal definition that has long characterized the legal conceptualization and operationalization of collective identities around the world, this comparative, constitutional law-focused, but also partly interdisciplinary project aims to demonstrate the complexity of ethno-racial conceptualizations and classifications, as well as their repercussions in courtrooms and beyond.

Laws in question here may target equal protection (non-discrimination), participatory identity politics (the political participation of identity-based groups in political decision-making), cultural identity politics (the recognition of identity-based groups in cultural decision-making by the State), the protection of historically rooted identity-based sensitivity (the criminalization of hate speech, Holocaust denial, etc.), affirmative action, special constitutional constructions form-fitted for the needs of indigenous populations, policies recognizing claims that mirror the State's ethnic kin's diaspora claims abroad, or the right to traditional, pre-colonization life. Legally constructed protective measures for racial groups (and other communities with collective identities) can be aimed at a variety of conditions: ensuring social equality or freedom of religion, protecting victims of hate crimes, mitigating cultural conflicts, combating racial segregation or apartheid, setting forth affirmative measures for compensatory, remedial, or transitional justice, etc.

From a different angle of categorization, laws may be placed under the clusters of anti-discrimination, identity politics, affirmative action, indigenous/aboriginal law, Diaspora law, or (national) minority rights. In technical terms, questions of recognition surface for example in debates on census

¹ Research grant No. 134962, provided by the National Research, Development, and Innovation Office of Hungary.

categories; anti-discrimination (and affirmative action), as well as hate crime statutes-eligibility; the enumeration of recognized national minorities in the European context; being recognized or listed as members of Indian (Native American) tribes or aboriginal groups under indigenous law; definitions in preferential naturalization schemes; genocide trials even in asylum law (where refugee status can be granted on the basis of a well-founded fear of persecution on account of race, ethnicity, or membership in a “particular social group”).

The importance of the project is underscored by the fact that recent decades have witnessed transformative changes in how the terms of ethno-racial meaning are assigned and conceptualized in social sciences and humanities, and to a certain degree in politics. The shift centres on the destabilization of categorical frameworks, where race as a social classification lost stability, self-evidence, and clarity.²

The research builds on the premise that conceptualization and operationalization, as well as the contestation of both appears in two domains: classifications pertaining to ethnic, racial, and national groups; and how affiliation criteria are established in the given communities. Our findings show that even within one national legal system and even pertaining to one community, several, sometimes even all of the operationalizing regimes may coexist.

Throughout the exploration, it became clear that while the lack of detailed normative classifications may often be seen by legislators, lawyers, advocates, and the common sense of the judiciary as sufficient, even beneficial (because it allows for flexible legal interpretation, provides political leeway, and an opportunity for “passing”), there is also a danger here for abuse, fraud, hijacking agendas of legal and political protection, and potentially even increasing victimization and marginalization, and it also raises questions of legal certainty (a cornerstone for the rule of law).

The project requires a challenging methodology: due to the lack of explicit normative international (and, as the project shows, mostly even national) languages, conceptualization needs to be deciphered from the comparative analysis of technical operationalizing measures and procedures in legislation and practice in national and international legal frameworks.

² Brubaker (2016).

2. Concepts and contents

The project accentuates that the conceptualization of communities by legal regimes takes place in a climate of political and linguistic ambiguity, as well as sensitivity and suspicion. Depending on the social and geographic context, the very terms are used in vastly differing ways in academic literature, as well as in legal and administrative documents.

For example, “race” is used in reference to quite a different set of human conditions in the US and the UK as in continental Europe. A controversial category, it is generally not considered to be a fruitful analytical concept in the social sciences, where it is widely understood to be a social construct rather than a biological trait (in the biological sense, the entirety of humanity is held to constitute one single race) without a theoretically or politically uniform definition.³

Nevertheless, race-based international and domestic legal instruments identify race with the apprehension of physical appearance, and put perception and external classifications in the centre when prohibiting discrimination, or violence on racial grounds. In this, it is rarely distinguished from ethnicity, and the two terms are often used interchangeably by lawmakers (and drafters of international documents) and, most of all, judicial bodies.

“Ethnic” communities are referred to in an even more complex environment. While many of their claims are grounded in the anti-discrimination rhetoric employed by racial minorities, some “ethnically defined” groups may also have cultural claims that national minorities would make. Legal terminology, as this book points out, often differentiates between the two groups on the grounds that ethnic minorities are different from national minorities in the sense that they do not have nation states as national homelands.⁴ In this way, ethnic minorities are a sort of hybrid categorization, blending and, often mirroring, the claims made by racial and national groups. The common element in provisions pertaining to race and ethnicity is that they usually focus on protection from maltreatment: discrimination, hate crimes, hate speech, or physical violence.

In contrast, rooted in and specific to the European ideological and political framework of nationalism, national minorities (distinguished from others, like ethno-racial minorities or recently arriving migrants) are conceptualized as communities that have a national homeland somewhere nearby,

³ Tajfel (1981).

⁴ Also see for example Hannum (2000).

usually in the approximate neighbourhood, and the cluster of minority rights (for national minorities) centres around the concept of sustaining the cultural essence and belonging to this national community: for example via the right to use (national minority) languages, to maintain cultural and educational institutions (on the expense of the majority state) or the right to participation in public and political life (as a national minority), i.e. to have street signs or use their language in public administration. The important feature is that these groups make claims to collective rights, bypassing the anti-discriminatory logic and seek recognition of cultural and political rights, particularly autonomy or the toleration of various cultural practices that differ from those of the majority, often requiring formal exceptions to generally applicable norms and regulations.

The above discussion demonstrates how terminology signals the content of legal and policy claims and frameworks. National minority rights have the recognition and accommodation of cultural claims of groups as well as individuals, and identity politics, in focus. The second set of legal and policy frameworks is oriented towards individual rights and focuses on non-discrimination, to be understood in the broad sense, including protection from hate crimes, hate speech, and several other related individual-based human rights claims (including consequences directly related to experiences of discrimination). The third batch includes those various social inclusion measures that “ethnicize” social policies or, when endorsing multiculturalism, the recognition of other forms of group-based, collective claims. Thus, “national minorities” and “nationalities” are appropriate terminologies for the first cluster, “racial” and “ethnic” minorities are adequate for the second, and the third approach institutionalizes a curious mix of all three clusters.

3. Procedures, contest, agency

As for operationalisation, the project’s starting point is that there are five ways in which ethno-national group membership can be defined: through self-identification; by members of the group; by the perception of the majority; by “objective” criteria; and by proxies, such as names, residence, etc. The project has taught us that that legal conceptualization and operationalization is intertwined with categories of analysis and experience, and that policy objectives and operationalizing techniques shape and determine conceptualization and legal terminology. In fact, it can be argued that policy objectives (such as collective right-recognition or protection from victimization) and operationalizing techniques (such as self-identification or external

perception) should shape and determine conceptualization and legal terminology, that is, for example, whether we talk about national, or ethnic minorities and not the other way around. Thus, for efficient operation, each policy goal and legal instrument will require a specific operationalization scheme, and defining membership criteria comes up in a completely different way when group formation is based on claims for these different kinds of preferences and privileges.

In addition to narrowly focused discussions on conceptualization and operationalization of collective difference, the project also includes the assessment of agency and contestation.

Ethno-racial legal constructions and classifications can be contested on both the individual and community levels (the latter pertaining to how groups are recognized), and this requires the legal assessment of such concepts as “the free choice of identity,” “covering” or “fraud,” as well as the concept of transracialism. Contesting practices can be divided into “soft” and “hard” forms of legal transracialism. “Soft” forms of legal transracialism include cases in which the monolithic nature of the conceptualization of race and other related terms is not questioned. “Hard legal transracialism” expands the scope of contestation into a multidimensional context. It transforms the very mindset of conceptualization by placing claims for the recognition of multiracialism and beyond: the right to move and navigate between ethno-racial boundaries. Both soft and hard transracialism can be further divided into two subgroups to differentiate cases that contest group recognition, and issues pertaining to individual membership (and legally verified access to relevant specific instruments, institutions, policies and actions).

Fraud and passing raise numerous complex ethical and epistemological issues. For example, if passportization, i.e. the granting of a national passport to a previously non-national external population is already “corrupted,” as one of the motivations for the legislation is political gerrymandering, is it really fraudulent to apply for citizenship despite a lack of an “ethnic identity,” if one meets the vaguely codified legal criteria? Most generally, what are the ethics of passing, if it is one of the scarce resources to cope with structural injustices and inequalities in an ethno-racially oppressive society?

The question of agency and the role of gatekeepers for conceptualization and operationalization raise another set of issues. The project drew considerable attention to the fact that identity politics and ethno-racial self-identification have arguably been the dominant trends in the second half of the 20th century and throughout the 21st century, recent developments also brought a boom in “objective” approaches to ethno-racial operationalization.

The latter development introduced the concepts of “re-biologization,” “molecularisation” or “genetic reinscription” of ethno-racial conceptualization, and “biotechnological imaginary” responding to policy, and commercial or political need and will, as “scientific” language to describe and encapsulate ethnicity has been revisited (also through legal instruments). Here, new and powerful entrepreneurs, gatekeepers, and new languages have emerged to define and operationalize race and ethnicity (and of course membership in the communities of collective difference). The development of cheap and fast genetic analysis brought a sweeping change in how race and ethnicity are perceived, lived, and operationalized, affecting a multitude of areas in law enforcement, immigration, (personalized and race-conscious) medicine, nationalism (in terms of how ethno-national ancestry and geology is understood)⁵ and how public and private imagination relates to ethno-racial identification. “Datafication and visualization” once again conflate race, ethnicity, and biology in forensics, biomedicine, population genetics, and ancestry testing. A significant contributor to the “new regime of racial signification and informationalization” is the highly lucrative commercial enterprise of direct-to-consumer ancestry services, conceptualizing molecularized heritage based on geography and advertising to determine someone’s identity through a broader web of genetic relationships and mapping and measuring of how relatives share DNA.⁶

Likewise, entrepreneurs in the Assisted Reproductive Technology industry are also examples for new global agents for substantiating ethno-racial meaning, as race is the crucial criterion for buyers of human eggs and sperm for donor insemination and IVF reproductive technologies, and services have become agents of racialization, enacting race and kinship, and producing not only children and parents, but also reproducing race, ethnicity, nationality, and kinship by managing, highlighting, moderating, sorting and crafting new narratives of racialized kinship.⁷ Also, new archaeogenetic technologies are being used to identify (the genealogy of) various groups, and not individuals, be them the nation-constituting majority or minorities. The point of interest in these developments for this book is how new agents for conceptualization and operationalization appear, often from the private, corporate sector.

The issues explored here include several areas of law enforcement, some of which are discussed in this book. Besides, due to developments in ethnicizing voice recognition, and the inclusion of ethnicity in the informationalization of predictive law enforcement, new avenues open for forensic

⁵ Pap (2021).

⁶ Pap – Kovács Sztikay (2023).

⁷ Pap (2023).

ethno-racial data generation: making inferences about the racial or ethnic appearance of unidentified suspects using genetic markers of phenotype or ancestry. The process has been described as the creation of “biological witnesses.”

In sum, e-biologisation is not only a successful commercial enterprise (rooted in the social desire to create novel aids in the process of developing and nurturing social and cultural identities), but also a technical tool for governmentality – celebrated and deployed by surveillance technocrats as well as agents of social progress, equality and dignity.

The project also had to engage with the phenomenon of how public and private actors relate to the use of ethno-racial signifiers and concepts. Thus, we pointed to how ethno-racial data processing-phobia in continental Europe leads to a reluctance to “see” race and ethnicity due to a false apprehension of privacy regulations. What we can call the Murphy’s law of discrimination refers to the following: perpetrators of discrimination or hate crimes never have problems identifying their targets, while authorities and well-intentioned stakeholders face privacy dilemmas in their efforts to tackle direct and even more complex, institutional marginalization and discrimination.⁸ Thus, the reluctance to recognize and register ethnicity by authorities or policy actors obstructs efforts to combat educational segregation or to implement targeted labor market support (as the system fails to see ethno-racial minority students or unemployed people as a target group for policies). Employers committed to the idea of applying hiring preferences for minorities find themselves paralyzed by concerns about ethno-racial data processing. Data protection arguments are also used as an excuse not to monitor ethnic profiling (over-policing), as well as a reason for not prosecuting racially-motivated hate crimes as such (under-policing).⁹ This approach arguably not only hampers the fight against discrimination, but also limits the potential for extending equality and diversity measures. The project, however, underlines that even the strictest European data protection/privacy regimes (such as the General Data Protection Regulation, GDPR) allow “talking about” race and ethnicity, i.e. processing ethno-racial data under certain circumstances.¹⁰

Finally, the project established the lack of a sufficient normative framework and the destabilization of intellectual and academic frameworks for discussions on race, ethnicity, nationality and other related forms of collective difference (excluding discussions on gender and non-specific manifestations of religion). Besides exploring the questions of group conceptualization and

⁸ Messing – Pap (2024).

⁹ Pap (2017).

¹⁰ Pap (2019); Pap (2020).

its operationalization via membership rules, and arguing that the two have intrinsic connections, the research also included questions of agency (the composition and emergence of gatekeepers for conceptualization and operationalization), and contestation (of the classification of groups, as well as membership), as well as attitudes of public and private actors to engage in seeing these various forms of collective difference.

That is the overall framework of the project, which has involved research and researchers beyond the ones presented in this book, yet the subsequent contributions need to be read in its context.

4. About the book: chapters and design

The first chapter in the book by Noémi Nagy and Norbert Tóth, “Conceptualization of minorities under Article 27 of the International Covenant on Civil and Political Rights—Divergent interpretations by State Parties v. the UN Human Rights Committee,”¹¹ is part of the project’s endeavors to show how international law conceptualizes minorities. The chapter explores how State parties to the 1966 International Covenant on Civil and Political Rights, which includes the only binding provision for the protection of minority rights at the universal level, as well as the UN Human Rights Committee (HRC), the monitoring organ of the Covenant interpret the concept. The assessment centers around under Article 27, which holds that “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” The text does not explain or conceptualize ethnic minorities, or common features to ethnic, religious or linguistic communities.

In reviewing periodic reports of 145 States on Article 27 as well as the case law of the 18-member independent expert group monitoring the implementation of the Covenant, including its 1994 General Comment No. 23, as well as concluding observations on State reports and views on individual communications, the authors structure their assessment along the features of the seminal definition provided by Francesco Capotorti, former Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. According to this, a minority is “a group numerically inferior to the rest of the population of a State, in a non-dominant position,

¹¹ See the chapter by Noémi Nagy – Norbert Tóth in this volume.

whose members-being nationals of the State-possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show a sense of solidarity, directed towards preserving their cultures, traditions, religion or language”.¹²

The first debated element of the minority definition pertains to the requirements of the “existence” of a minority community. The authors show that 17 States do not recognize the existence of any kind of minorities on their territory. Many Muslim countries (member States of the Organization of Islamic Cooperation) tend to interpret Article 27 to cover only non-Muslim religious minorities. Others include indigenous peoples within the concept of minorities. Ukraine is also special in this regard, as there ethnic minorities and native communities are codified as distinct from national minorities due to not having a kin-state.¹³ The authors emphasize that the overwhelming majority of Article 27-based cases which the Human Rights Committee decided on the merits actually concern indigenous peoples (whereas the provision does not even mention the term “indigenous”). As the authors show, in stark contrast to many States’ position, in its General Comment No. 23 the HRC stated that “[t]he existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.”

The other controversial element of the minority definition refers to the requirement of citizenship. The authors identify 39 countries that see this as a prerequisite for being recognized as a minority. The authors point to the HRC’s different approach in this regard as well. In para. 5.1. of General Comment No. 23, the Committee claimed that Article 27 does not require members of a minority group to be citizens of the State party, and also entitles non-nationals, including migrant workers or even visitors. Citing broad documentation in the literature, the authors emphasize how different this attitude is from that of the ICCPR’s drafters, as presented in the travaux préparatoire, the annotations on the draft of the two Covenants, prepared by the Secretary-General in 1955, which showed an agreement that the minority clause (then article 25) “should cover only separate or distinct groups, well-defined and long-established on the territory of a State.”¹⁴ The document adds that it was also understood that the provisions concerning the rights of minorities “should not be applied in such a manner as to encourage the creation of new

¹² See Capotorti (1979).

¹³ Art. 1. para. 1. of the Law of Ukraine of July 1, 2021 No. 1616-IX.

¹⁴ UN General Assembly: UN Doc. A/2929, 1 July 1955, p. 181, para. 184. Cited by Hannum (2012) 61.

minorities or to obstruct the process of assimilation”¹⁵—a clear indication that immigrants were not meant to be protected.

The authors also identify countries that require long-lasting presence for recognized legal status as a minority, and point out that the Committee has been equally critical towards these States, and sees Article 27 to include non-settled, nomadic groups, as well as immigrants and refugees.

The authors point out that the remaining three elements of Capotorti’s definition appear only sporadically in State reports, for example Czechia refers to “numerical inferiority,” and Chile to the “non-dominant position.” In this regard, the authors bring attention to the 1993 *Ballantyne, Davidson and McIntyre v. Canada*-case,¹⁶ which to date remains the only individual communication where the HRC directly addressed the issue of what is a minority, and where the Committee concluded that English-speaking people in Quebec are not entitled to minority rights, since “the minorities referred to in article 27 are minorities within a [ratifying] State, and not minorities within any province. A group may constitute a majority in a province but still be a minority in a State and thus be entitled to the benefits of Article 27. English-speaking citizens of Canada cannot be considered a linguistic minority.” The authors raise the concern that if a group which forms a majority in a State can never be classified as a minority, and the Committee does not treat the factor of non-dominance and power relationships as a conceptual element of minorities, oppressed majorities will remain without protection.

The authors also identify States which, in line with the Capotorti-definition, explicitly require ethnic, religious or linguistic characteristics to be “different from those of the rest of the population.” This, according to the authors’ assessment, also did not trigger the HRC’s attention, but the HRC did point out that indigenous peoples and immigrant groups can also come under the personal scope of Article 27, even when they do not differ from the majority in religion or language.

Finally, the authors show that the last element of the Capotorti-definition, that is, to show a sense of solidarity, directed towards preserving the distinctive characteristics of a given minority group does not appear to be relevant for either the States or the HRC.

Connecting to how indigenous people and national minorities are conceptualized in an overlapping fashion, the next chapter (written by the author of this introduction)¹⁷ provides an overview of the most important features of international law and the diverse national legal landscapes on Indigenous

¹⁵ UN Doc. A/2929, p. 182, para. 186.

¹⁶ *Ballantyne, Davidson and McIntyre v. Canada*, Com. Nos. 359/1989 and 385/1989.

¹⁷ See the chapter by Andras L. Pap in this volume.

rights; as well as the political ethics behind theorizing Indigenous exceptionalism, the unique constitutional fiction of tribal sovereignty and legal pluralism; novel designs of land rights, and tribal membership governance. The chapter describes the unexampled models of (settler) states initiating and recognizing “biologized” classifications of tribal descent in a unique interplay of self-identification, community acceptance and objective criteria-based conceptualizing and operationalizing of Indigeness. The text shows how the concept of Indigenous rights is rooted in the moral and political expression of the wrongfulness of colonization, as well as in the commitment to compensate for some of the grievances and to recreate a spatial and a legal framework for the descendants of the oppressed to continue (or reimagine) exercising some crucial elements of their traditional lifestyles, which include cultural practices and rights to engage in traditional pre-industrial agro-economic activities (such as hunting and fishing). The chapter emphasizes that in this context (unlike in the case of national minorities) there is no direct power-sharing political pressure or an underlying concern for national or international security.

The discussion outlines how Indigenous law and adjacent policies provide diverse territorial, financial and symbolic forms of compensation for colonialist sins, including unique symbolic constitutional discourses, Indigenous-specific legal institutions pertaining to land rights (including novel forms of ownership and access), special forms of cultural autonomy, symbolic constitutional and political speech acts (such as land acknowledgments), special measures concerning the adoption of Indigenous children, the amendment of business culture and legal frameworks, special sensitivity to cultural appropriation (reflected in trademark and copyright protection), affirmative measures in political representation, novel formations of truth and reconciliation, as well as mainstreamed recognition of special needs that Indigenous people have in the terrain of anti-discrimination law and religious freedom.

The text also shows how there is an openly endorsed reluctance to define indigeneity in the international level, and how contesting indigeneity surfaces in multiple forms and dimensions: initiated by individuals, the state, as well as the communities/tribes, contesting groupness (the recognition of a given community as Indigenous), as well as tribal membership or concerning the self-identification of individuals as Indigenous in the context of preferential treatment programs, or social positioning in marketable identity profiles.

The subsequent chapter, by Zsolt Körtvélyesi, “Indigenous Rights in Hungary? Provenance and Repatriation of Human Remains,”¹⁸ complements the

¹⁸ See the chapter by Zsolt Körtvélyesi in this volume.

previous assessment, by diversifying the focus slightly away from “subjects” to “objects” of indigeneity, and thereby accentuating the complexity of processes of recognition, accommodation and classification—and the surviving legacy of practices rooted in notions of racial hierarchies. The author first positions repatriation as an emerging indigenous right and claim in territorial and social contexts where both the direct legacy of traditional colonization and domestic groups claiming the indigenous label are absent. Following this, he explains how it is embedded in the broader context of a remedial process that seeks to secure equality (in retrospect as well as for the future) as a question of equality, human rights, and minority rights; remedying the history of colonialism and restoring dignity, and of accommodating participation, ceding public power to minority groups, granting rights that can take many forms including access, possession, ownership, veto rights, and how it can transcend to all groups (like the Roma in Europe) whose collective identity is decisively shaped by external racialization.

Revisiting the interconnected conceptualization of indigenous peoples and national minorities, the next chapter by Balázs Dobos, “Individual self-determination or community control? Who can elect European national-cultural minority autonomies?”¹⁹ provides an overview of regulatory models and conceptual and practical challenges within the purview of non-territorial autonomies, used mostly within the frameworks designed for national minorities, but also in the context of indigenous law.

The chapter begins with an overview of the historical emergence and conceptual background of personal autonomies, unique forms of self-governance established for the management of linguistic, cultural, educational and religious affairs. Dobos reviews how the idea of cultural autonomy, as an alternative to models of self-determination (potentially implying secession) emerged from Austrian social democrats Karl Renner and Otto Bauer,²⁰ through the establishment of public bodies with legal personality, operating collective rights and elected by registered voters. Subsequent initiatives, the author explains, were set forth by Baltic German theorists, also by the left-liberal Jewish communities in the Tsarist Russia before the First World War, and later opened up for other nationalities. The first wave of practical establishment took place in the interwar era in Lithuania (where a 1920 law recognized Jewish councils elected at the municipal level, managing educational and religious affairs and levying taxes on members), Latvia and Estonia. Here even the 1920 constitution referred to cultural autonomy, and the 1925 Minorities

¹⁹ See the chapter by Balázs Dobos in this volume.

²⁰ Bauer (2000).

established cultural councils for Germans and Jews, and also incentivized Russians and Swedes, as well as other communities with 3000 members.

Dobos shows how debates pertaining to membership rules were present from day one, as membership in national minority communities was based on classifications registered in national ID cards. However, the prospect of German education for children encouraged many to seek to change their official nationality, which made the Estonian state to react by restricting self-identification and narrowing the possibility for change to classifications to pre-1920 and “mistaken” cases. Subsequent legislation further narrowed the recognition of non-Estonian national minority status to persons living in non-Estonian majority settlements, and in mixed marriages; if the father was Estonian, the children became Estonian, otherwise the parents could decide.

By presenting eight contemporary case studies, Dobos presents flows in the regimes designed for institutional custodians of various forms of autonomy, such as minority self-governments (Croatia, Hungary, Slovenia), special parliaments (Finland, Norway, Sweden) and councils (Estonia, Serbia).

Ethnobusiness or ethnocorruption is in the center of the analysis here, which the author defines as the unfair exploitation of the legal framework for the protection of minorities for financial or political gain, or the abuse of such measures for personal gain against the intentions of the legislator, when preferences or measures under the auspices of minority rights are sought by a person whose “genuine” membership in the community can be questioned.

Dobos provides a comprehensive overview of the development and current state of the unique European trans-border personal autonomy scheme of the indigenous Sami in Norway, Finland and Sweden. Sami parliaments were established in the late 1980s, incorporating registered voters, irrespective of their citizenship or residence in the country. Here too, debates and contestations have accompanied the institutional arrangements. Due to the lack of historical statistical-census data, advanced assimilation, and ambiguous ethnic boundaries, with many Sami having moved from ancestral areas to cities, abandoned traditional activities and even lost their Sami language, it is challenging to conceptualize and operationalize Saminess. As in other regimes developed for indigenous peoples, as discussed in previous chapters in this book, descent, tribal membership, inclusion in registration for the Sami Parliament and access to preferential schemes for traditional reindeer herding often do not always overlap harmoniously. When designing the Sami parliaments, governments acted in cooperation with Sami communities and opted for generally defining Sami as someone who is descended from a Sami speaker. The laws, relying on self-identification along some sort of evidence that the applicant is or one of their grandparents is/was a native Sami speaker,

or that they are descendants of persons listed in the land, tax and population registers as a mountain, forest or fishing Lapp, or on the electoral roll, are fairly similar in all countries. The 1987 Norwegian Sami Act, the 1992 Swedish and the 1995 Finnish Law on the Sami Parliament, however, as Dobos shows, are not specific enough, and have led to extensive litigation and political controversies concerning rejections from the Sami register.

As for Central-European models for personal autonomy, Dobos finds that legal regimes rarely go beyond individuals' declaration of identity. An almost unique example is Slovenia, where the 1994 law set forth that Hungarian, Italian and Roma communities are authorized to establish criteria for inclusion in the registry. Dobos notes that community reaction has been quite resistant, only Italians tend to follow through application-monitoring, conducting personal interviews, for example. Estonia is another example, the 1993 law initiated the practice of asking applicants to the registers to write a few sentences about their relation with the community, and attach a photo. The remaining CEE regimes analyzed by Dobos concern larger communities and more intense debates and reported cases of abuse. In Serbia, the data protection ombudsman expressed suspicions that political party activists were registering voters on the minority register without their knowledge or will, and many reports concerned abusive registration-practices. A common feature of these institutional arrangements is the dominance of uncontrolled self-identification as the operationalizing principle (with Hungary institutionalizing a unique quasi-objective criterion, where voter-registry applicants need to declare the knowledge of the minority language and culture but no verification procedures are set forth).

Dobos concludes his assessment by inferring that given the nature and role of self-identification, debates, controversies and abuses are inevitable, but they can be mitigated by the intensive involvement of the minority community in determining and managing group boundaries and membership issues.

The subsequent two chapters, connecting to the project's focus on the Murphy-law of data protection, discuss how ethnicity and race are registered in the criminal justice process. First, Eszter Kovács Szitkay, in "The bumpy road of ethnic data in Hungary: Regulations on law enforcement authorities"²¹ explores how ethnic data appears and disappears in law enforcement practices. Following a detailed overview of European law (in particular the GDPR, and the EU Artificial Intelligence Act) and national legislation, using the case study of Hungary, the author maps how the various operationalizing mechanisms (self-identification, perception, proxies, etc.) can and should be

²¹ See the chapter by Eszter Kovács Szitkay in this volume.

applied in different contexts (such as investigating hate crimes; forensic schematics; applying predictive policing and automated justice; or implementing guidelines for policing in multi-ethnic/multicultural communities). The author carefully maps the various ways in which law enforcement authorities generate ethnic data.

The next chapter, by András Czebe, “Races in forensic identification”²² is closely connected to the previous one, following up on predictive law enforcement and focusing on the forensic conceptualization and operationalization of race and ethnicity, and identifying the new gatekeepers of scientific language on these terms. The fora are the various ways in which scientific, genetic and biological information can be individualized and used in criminal procedures to establish the identity of a wanted person or an unidentified corpse, and the uniqueness of how the concepts of race and ethnicity intersect in those datasets (in most cases, beyond the forensic terrain). The author explains how forensic anthropology connects microscopic hair- and skeletal analysis with familial DNA searching and DNA phenotyping, a marker analysis to infer the physical appearance of people in terms of hair, iris, facial morphology, skin pigmentation, and also classification pertaining to geographical origin. The introduction of the concept of a “social group of races (ethnicities) because of ancestry” provides a unique contribution to the project by pointing to the intersection and overlapping of ethnicity and race.

The last chapter, by Katalin Szajbély, “Not-so-symbolic issues in recognizing and accommodating ethno-religious identity: Religious symbols and clothing in educational institutions in the practice of the UN Human Rights Committee and the European Court of Human Rights”²³ focuses on religion as a form of minority status and a prevalent proxy for ethnicity, and points to the diverging standards of the European Court of Human Rights and the UN Human Rights Committee in defining and interpreting religious freedom, and the use of religious symbols and clothing, as particular manifestations of lived ethno-religious identity. The author underlines that religious freedom, and hence the status of the religious minorities is diffuse and obscure, as international jurisprudence contextualizes and adjusts it according to geographic and socio-political and constitutional traditions and geographic locations on the one hand, and protecting individual human rights vis-à-vis majorities on the other.

The book is one of the numerous research efforts produced under the auspices of the Hungarian Research Fund-supported project, which covers

²² See the chapter by András Czebe in this volume.

²³ See the chapter by Katalin Szajbély in this volume.

four overlapping categories of collective difference: ethnicity, race, indigeneity and religion. In addition to jurisprudence, the case studies also present cultural and educational policies, political struggles, legislation, law enforcement practices, and languages on sovereignty.

Given that the entire research project was triggered by the detrimental practical consequences of the lack of clear conceptualization, classification and definition-making in legal instruments, the aim of the book is to contribute to scholarly (and potentially policy and political) discussions, and, in the long term, to provide prospective insights for more coherent future legislation and jurisprudence.

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Noémi Nagy* and Norbert Tóth**

Conceptualization of minorities under Article 27 of the International Covenant on Civil and Political Rights: Divergent interpretations by State Parties v. the UN Human Rights Committee

Abstract. *As part of a more general endeavour to conceptualize minorities in international law, this chapter explores how State parties to the International Covenant on Civil and Political Rights as well as the UN Human Rights Committee, the monitoring organ of the Covenant, interpret the concept under Article 27. Revealing and comparing the divergent views around the personal scope of the Covenant's minority provision is the first aim of the authors. The second is to find out whether it is possible to deduce a customary law definition of minorities from the reporting materials of States and establish how that compares with Capotorti's notion, the most commonly cited definition in academia and practice.*

Keywords: *ethnic, religious and linguistic minorities; Article 27 of the International Covenant on Civil and Political Rights; UN Human Rights Committee, customary international law*

1. Introduction

Following the winding path of scholarly endeavours in search of a definition of minorities,¹ this chapter focuses on interpretations of Article 27 of the International Covenant on Civil and Political Rights (ICCPR or Covenant),² which remains the only binding provision for the protection of minority

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¹ For an overview in international law see Nagy – Vizi (2024), for a recent explanation on the theoretical and practical significance of the issue see Pap (2021).

² International Covenant on Civil and Political Rights, UNTS Vol. 99, p. 171. Adopted by the General Assembly of the United Nations on 16 December 1966.

rights at the universal level. Specifically, we intend to shed light on how State parties to the ICCPR as well as its monitoring body, the UN Human Rights Committee (HRC or Committee), interpret the concept of minorities within Article 27, and thus the personal scope of the Covenant's minority provision (that is, who are protected under Article 27).

The adoption of the ICCPR in 1966 was the first major step towards recognising specific minority rights in international human rights law, with a separate article on the rights of persons belonging to minorities: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." The text of the provision itself does not conceptualize "ethnic, religious or linguistic minorities," nor does it provide any guidelines on how subjective and/or objective elements should be taken into consideration for operationalising the term. The notions of ethnicity, religion, language and culture were also left undefined. In turn, during the drafting of Article 27, many State delegations were concerned about what "existing" should mean and argued that minorities under Article 27 must have historical ties with the State where they live and the article should not be used to encourage the emergence of new minorities. The *travaux préparatoires* shows an apparent consensus on not hindering the process of (voluntary) assimilation.³ Eventually, the final text of the provision did not require citizenship or any degree of permanence as a condition for recognising a minority; instead, protection is available to all persons belonging to such a group who share in common a culture, religion and/or a language.

As can be seen, "the wording of Article 27 is formulated in an extremely cautious, vague manner,"⁴ leaving many questions, including the personal scope of the provision, open, to be answered by the State parties and the HRC. The purpose of this chapter is to reveal the various interpretations offered by State parties, who have primary responsibility to protect the human and minority rights under their jurisdiction, as well as to shed light on the evolving understanding of the 18-member independent expert group monitoring the implementation of the Covenant. Comparing the two lines of interpretations makes it possible to assess convergence or divergence between State practice and expert approaches, which, in turn, helps us establishing the extent of willingness of States to apply Article 27 in a Covenant-conform manner. In addition, looking at the relevant State practice also seeks to

³ Taylor (2020) 795–796.

⁴ Nowak (2005) 640.

answer the question whether there exists a customary law definition of minorities. To our knowledge, this is the first endeavour in scholarship to do so (at least, based on the reporting material under Article 27).⁵

Accordingly, this chapter has two main parts. The first one (Section 2) examines the content of periodical reports submitted by State parties to the ICCPR in the context of customary international law on minorities. This is important because while it is common knowledge that public international law does not provide for a definition of minorities, this statement really only holds true when it comes to treaty law. We, however, presume that the concept of minorities or at least some elements of it might have evolved during the decades-long practice of States, based on their view that their conduct in relation to the subject-matter is required by law.⁶ Evidence of such State practice is offered through the reporting obligations of State parties to the ICCPR, in the form of reports regularly submitted to the Human Rights Committee. In this part, we explore the content of State reports themselves, not the consideration thereof by the HRC. This is another unique contribution of our chapter, since most commentators focus on the concluding observations of the HRC. The second main part of the chapter (Section 3) explores the case-law of the Committee, including its general comment on the interpretation of Article 27,⁷ concluding observations on State reports, and views on individual communications. Finally, Section 4 compares our results based on the content analysis of the two branches of materials, and offers our final conclusions.

For the collection of the relevant material, we have mainly relied on two online databases available at the website of the Office of the High Commissioner for Human Rights.⁸ Since we have found these databases incomplete (for unknown reasons, not all periodic reports have been uploaded there), we have expanded our research to the database of the CCPR Centre, an international non-governmental organization dedicated to covering issues that relate to the Covenant.⁹ Our analysis was primarily based on the English

⁵ One of the authors of this chapter, Tóth (2018) has already raised the possibility of identifying a customary law norm for the definition of minorities, but not within the specific context of the ICCPR.

⁶ Tóth (2018).

⁷ HRC: General Comment No. 23: Article 27 (Rights of Minorities), UN Doc. CCPR/C/21/Rev.1/Add.5, 26 April 1994.

⁸ Website of the HCR: <https://www.ohchr.org/en/treaty-bodies/ccpr> and the JURIS database (a central repository of the jurisprudence of the United Nations Treaty Bodies): <https://juris.ohchr.org/>

⁹ Centre for Civil and Political Rights: <https://ccprcentre.org/>

versions of the documents. When no English version was available, we used either the French or the Spanish version.

For the content analysis, we have applied two reference points: the famous minority definition of Francesco Capotorti, former Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities¹⁰ and the International Law Commission's (ILC) Draft conclusions on identification of customary international law¹¹ (Draft conclusions). Using these documents has the advantage that they are relatively well-known among scholars,¹² and that both were elaborated within the framework of the UN, just like the ICCPR. The ILC's Draft conclusions are obviously relevant for the purposes of Section 2, whereas the Capotorti definition was used as a benchmark against which both State reports and HRC documents were measured.

As a last preliminary remark, it must be mentioned that although the Capotorti definition seems to cover most if not all relevant elements of a minority, it has not been officially endorsed by the United Nations.¹³ Conceptual debates still appear to concentrate on the existence of historical links between the minority and the State, and the issue of citizenship: Does a group need to have resided for a certain minimum period of time in the State territory in order to be recognised as a national minority? Shall the members of a minority community be expected to hold citizenship in the State in which they live and wish to be recognised as a minority? As we will see below, individual States and the HRC have very different opinions on these questions.

2. State reports on Article 27 ICCPR—an emerging customary law norm?

This section analyzes the content of periodical reports of State parties to the ICCPR, submitted to the Human Rights Committee. Before that, we briefly examine the notion and formation of customary international law, which provides the context for this part of our research.

¹⁰ "A minority is a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their cultures, traditions, religion or language." Capotorti (1979) p. 96. para. 568.

¹¹ For the text of the Draft conclusions see: A/CN.4/SER.A/2018/Add.1 (Part 2) Yearbook of the International Law Commission 2018. Volume II. Part Two. United Nations, New York and Geneva, 2022. 90–91.

¹² Nowak (2005) 643.

¹³ De Villiers (2021) 53.

2.1. Customary international law

The ILC holds that there are two constitutive as well as conjunctive preconditions for the formation of customary international law norms,¹⁴ according to the relevant treaty rules of international law,¹⁵ namely general practice (*diuturnitas*¹⁶) and/or *usus*,¹⁷ which should be based on the legal convictions of those concerned (*opinio iuris sive necessitatis* or simply *opinio iuris*).¹⁸ These two elements are to be examined separately and both the whole context and the particular circumstances in which evidence of their existence emerge must be taken into account.¹⁹ According to the ILC, general practice still primarily encompasses the practice of the States, although there is also some room for international organizations in that regard.²⁰ However, acts of other international subjects are not considered relevant by the ILC, albeit they may be relevant in assessing the practice of States or international organizations.²¹

State practice is the act (whether active or passive) of the State, including the actions of all of its organs (legislative, executive, judicial, or other).²² This can manifest itself in a number of ways, including physical or verbal acts, and even inaction under certain circumstances.²³ The Draft conclusions set out, by way of example, some of the manifestations considered to be typical, such as diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct “on the ground”; legislative and administrative acts; and decisions of national courts. Importantly, in the ILC’s view, there is no predetermined hierarchy among the various forms of State practice,²⁴ and it may also take other forms in addition to those enumerated.²⁵ Forms of evidence might overlap—a phenomenon also acknowledged by the ILC

¹⁴ This is the so-called two-elements theory or traditional approach. Cf. Thirlway (2019) 65.

¹⁵ Cf. Article 38 (1) (b) of the Statute of the International Court of Justice.

¹⁶ Viz. durability, long duration.

¹⁷ Viz. practice, use or habit.

¹⁸ Conclusion 2 of the Draft conclusions. For more recent studies see e.g. Chimni (2018); D’Aspremont (2019); Cannizzaro (2024).

¹⁹ See Conclusion 3 of the Draft conclusions.

²⁰ Viz. “In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.” Para 2. of Conclusion 4 of the Draft conclusions.

²¹ See Conclusion 4 of the Draft conclusions.

²² See Conclusion 5 of the Draft conclusions.

²³ See Conclusion 6 of the Draft conclusions.

²⁴ See para. 3 of Conclusion 6 of the Draft conclusions.

²⁵ See paras. 1 and 2 of Conclusion 6 of the Draft conclusions.

itself²⁶—because a single proof may sometimes underpin both *usus* and *opinio iuris*. Obviously, State conduct related to the decisions of international organizations and international conferences may also apply to specific international treaties. In addition to State conduct identifiable in the minutes of talks, reservations to international treaties, objections to such reservations, interpretative or other unilateral statements as well as other State acts, such as the drafting of a treaty and subsequent implementation thereof, are clearly emphasized.²⁷ Reservations to Article 27 of ICCPR are of particular importance for our purposes.²⁸ Certainly, State conduct related to a given international treaty, such as the breach of its rules, the reactions of other States in connection therewith, or the suspension of the treaty or even the denunciation of it, may also have relevance.

As regards legal conviction, the other constitutive and conjunctive precondition of customary international law, the following findings can be made on the basis of the Draft conclusions. Treaty provisions may reflect customary norms in three specific cases. First, if it follows from the interpretation of the provisions of the treaty that a customary norm was already in existence at the time of the codification process of the treaty in question.²⁹ Second, the treaty rule itself may help to crystallize a customary rule that has already been emerging at the time of the conclusion of the treaty.³⁰ Third, the treaty itself may generate a new customary rule.³¹ Regarding this latter situation, D'Amato argues that *generalizable provisions* in bilateral and multilateral treaties are capable of creating a general norm of customary law.³² He even adds that many customary rules, probably a majority of them, are treaty-based.³³ He also thinks that the so-called qualitative element of forming customary norms (*opinio iuris*) represents a commitment to a specific State conduct at the time of concluding the treaty.³⁴ It is also relevant to note that the International Court of Justice, in its 1969 judgment in the North Sea

²⁶ See para. 4 of the Commentary of the ILC to Conclusion 6 of the Draft articles.

²⁷ See para. 5 of the Commentary of the ILC to Conclusion 6 of the Draft articles.

²⁸ Only two countries, France and Türkiye (Turkey) have made reservations to Article 27 of the ICCPR so far, however, none of them exclude the applicability of that provision in its entirety. The French Republic excluded the applicability of the Article in relation to language matters in light of Article 2 of its constitution, whereas Türkiye, referring to its constitution as well as the Lausanne Peace Treaty of 1923, applies the provision only to non-Muslim minorities in its territory. See, <https://tinyurl.com/4556xcz5>

²⁹ Para. 1 (a) of Conclusion 11 of the Draft conclusions.

³⁰ Para. 1 (b) of Conclusion 11 of the Draft conclusions.

³¹ Para. 1 (c) of Conclusion 11 of the Draft conclusions.

³² D'Amato (1971) 104.

³³ D'Amato (1970) 899.

³⁴ D'Amato (1971) 160.

Continental Shelf case, stated concerning the “equidistance principle” that only a treaty provision which is “of a fundamentally norm-creating character” may form the basis for a general rule³⁵ that is, which can function as a general norm according to Thirlway.³⁶ D’Amato called this approach developed by the International Court of Justice the “rule of manifest intent”.³⁷

However, it is not the issue of the potential customary legal nature of Article 27 of ICCPR³⁸ that we are most concerned with here but whether States parties’ actions or inactions have provided evidence for customary norms on its personal scope during the decades since the entry into force of the Covenant. Periodical reports of States with respect to the ICCPR may thus play an important role when it comes to forming customary norms, because they contain relevant information on State practice³⁹ and the States’ related legal convictions.⁴⁰ The reason why the “jurisprudence” of the HRC cannot be considered relevant in forming customary norms with respect to Article 27 is that the United Nations is not a party to the Covenant but rather an actor that was mandated by State parties to monitor as well as interpret its provisions.

Undoubtedly, our analysis faces certain inherent challenges and limitations. Firstly, as the Draft conclusions suggest, a legal norm’s customary nature can only be proven by assessing all the relevant and available forms of evidence and the context as well as the nature of the norm are to be taken into account. For these reasons, the analysis of the periodic reports alone, together with the relevant jurisprudence of the HRC can at best create a presumption without serving full-fledged evidence of the existence or the lack of a customary international legal norm. Moreover, as it has already been discussed above, our research is limited to the available and thus incomplete

³⁵ “[...] ait [...] un caractère fondamentalement normatif”. North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 42. para. 72.

³⁶ Thirlway (2019) 84.

³⁷ D’Amato (1970) 892.

³⁸ In fact, in its General Comment on reservations, the HRC expressed the view that “provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not [...] deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language.” *General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para. 8. It follows from this, that at least partly Article 27 reflects customary international law.

³⁹ Viz. “conducts in connection with treaties.” See para. 2 of Conclusion 6 of the Draft conclusions.

⁴⁰ Viz. “governments’ legal opinions.” See para. 2 of Conclusion 10. of the Draft conclusions.

dataset on the issue. Yet, this writing should be considered as a significant step towards clarifying the personal scope of Article 27 of the ICCPR.

2.2. State reports submitted to the HRC on Article 27

As stated above, Francesco Capotorti's minority concept serves as a point of departure for our analysis. Six elements can be identified there: (1) the subject (group), (2) a quantitative element (numerical inferiority to the rest of the population of a State); three qualitative features: (3) being in a non-dominant position; (4) the group members should be nationals of the State; (5) the group members possess ethnic, religious or linguistic characteristics differing from those of the rest of the population; and (6) finally, a subjective element: the members of the group have the common—at least implicit—emotional purpose of preserving their culture, traditions, religion or language. It is highly probable that some countries elaborated definitions in which they added further elements, thus we considered important to create an “other” category as well, by extending the research to this latter opaque, yet presumably heterogeneous category.

Due to the difficulties regarding access, we have scrutinized periodic reports of 145 States⁴¹ from among the 174 parties to the ICCPR, which can be considered representative (83 percent).

2.2.1. *The existence of a group*

17 States (12 percent) do not recognize the existence of any kind of minorities on their territory under Article 27, which only applies “[i]n those States in which ethnic, religious or linguistic minorities exist” (emphasis added). The very fact that State parties to the ICCPR can be divided into two categories—those who recognize the existence of minorities and those who do not—makes it possible to consider the applicability of the so-called specially affected states (SAS)-doctrine to customary international legal norms on minorities. According to the SAS-doctrine that originates from the ICJ's 1969 ruling in the North Sea Continental Shelf case,⁴² not every State's practice or legal conviction matters when it comes to the formation of customary norms

⁴¹ The study encompasses Chinese Macao, too, which is not a State under international law, and for this reason, it was not taken into consideration upon calculating the number of States affected.

⁴² North Sea Continental Shelf case, Judgment, I.C.J. Reports 1969, p. 43. para. 73.

but only those specially affected in relation to the subject of the norm itself.⁴³ Furthermore, the stance of States vis-à-vis the issue might change over time as it happened with Chile,⁴⁴ Japan,⁴⁵ and Uruguay,⁴⁶ where either due to regime change⁴⁷ or simply because of certain societal changes that affected the official legal policy of a country, the governments gave up their policy of denial in relation to minorities.

However, there are still “hardliner” States that do not compose a homogenous group but some of them share certain common characteristics. Three North African countries (Algeria,⁴⁸ Egypt,⁴⁹ Libya⁵⁰) are worth mentioning in the first place. Each of them insists on being a homogenous society in every aspect of Article 27, albeit some countries of the region are in a very similar situation (Morocco, Tunisia) and have already recognized the possibility of acknowledging religious minorities at least. In a similar vein, it is not entirely impossible that the three States mentioned would reconsider their rigid stance at some point in the future. In addition, the two countries of the Korean peninsula also consider themselves homogenous in this sense, though the Republic of Korea (South Korea) shows a bit more flexibility when it extends the scope of Article 27 to “nationalized overseas Chinese” or other “non-Korean

⁴³ On the nature of the SAS-doctrine see Heller (2018).

⁴⁴ “In Chile there are no ‘minorities’ within the meaning of article 27 of the Covenant.” CCPR/C/1/Add.25. (1978) 53. But see e.g. “The State recognizes as the main indigenous ethnic groups in Chile [...]” CCPR/C/95/Add.11. (1998) para. 261. and “Chile’s ethnic minorities,” CCPR/C/CHL/5 (2006) paras. 308–309.

⁴⁵ “However, minorities of the kind mentioned in the Covenant do not exist in Japan.” CCPR/C/10/Add.1. (1980) p. 12. and see e.g. “Regarding the indigenous people, the Government recognizes Ainu people are the only indigenous people in Japan.” CCPR/C/JPN/7 (2018) p. 18.

⁴⁶ “[...] in Uruguay there are no ethnic minorities as defined by the Sub-Commission on Prevention of Discrimination and Protection of Minorities.” CCPR/C/95/Add.9 (1996) para. 163. and “people of African descent” CCPR/C/URY/6 (2019) para. 28.

⁴⁷ A radical turn happened in this respect in Chile after the overthrow of Pinochet’s regime in 1988.

⁴⁸ “Any classification of the population of the country in terms of ethnic, religious and linguistic criteria now smacks of the unacceptable.” CCPR/C/101/Add.1. (1998) para. 178. but cf.: “In addition to its Arab and Muslim culture, Algeria also embraces its Amazigh heritage and its kinship with Africa and the Mediterranean.” CCPR/C/DZA/4. (2011) Algeria. para. 328.

⁴⁹ “L’Égypte n’a pas promulgué de loi spéciales concernant les minorités, car il n’en existe pas sur le territoire égyptien.” CCPR/C/51/Add.7. (1988) 113. and “Like its predecessors, the 2014 Constitution does not recognize the concept of a minority.” CCPR/C/EGY/5. (2004) para. 149.

⁵⁰ “[T]he Libyan people is a homogenous people that professes the same religion (Islam) and speaks the same language (Arabic). There are no ethnic minorities.” CCPR/C/28/Add.16. (1983) para. 56.

nationals.”⁵¹ It is unlikely that the People’s Republic of Korea (North Korea) would abandon its policy of defining itself as a homogenous society any time soon,⁵² but there is a chance that South Korea might follow the footsteps of Japan in the forthcoming years or decades. Besides, there are some genuinely homogenous countries, where immigration may bring change in the future, at least in relation to their attitude towards the scope of Article 27 of the ICCPR. Mainly European micro-states or smaller countries like Liechtenstein,⁵³ Malta,⁵⁴ Monaco,⁵⁵ San Marino,⁵⁶ or Iceland⁵⁷ must be mentioned here. In addition, there are countries where constitutional traditions do not favor the concept of minorities: France,⁵⁸ Haiti,⁵⁹ Rwanda,⁶⁰ and Nepal⁶¹ fall under this category, while Zambia does not clarify why it did not recognize any groups under Article 27.⁶² Finally, Tanzania made an unusual statement in

⁵¹ “Although the minorities in the strict sense of article 27 of the Covenant do not exist in the Republic of Korea, nationalized overseas Chinese or other non-Korean nationals in the Republic of Korea enjoy their respective culture, religion and language, in accordance with the Constitution and the Covenant.” CCPR/C/114/Add.1. (1996) para. 257.

⁵² “The DPRK is a country of one and single nation. So the issue of minorities does not exist in the DPRK.” North Korea, CCPR/C/PRK/2000/2. (2000) para. 162.

⁵³ “Since there are no linguistic minorities in Liechtenstein within the meaning of the Covenant, no further legislative measures have been adopted to implement this article.” Liechtenstein, CCPR/C/LIE/2003. (2003).

⁵⁴ “In Malta no minorities exist [...]” Malta, CCPR/C/68/Add.4. (1993) p. 79.

⁵⁵ “The concept of ‘national minority’ does not exist under Monegasque law and would be difficult to apply in Monaco. Monegasque nationals number only 5,070 of the 29,972 inhabitants and are therefore a minority in their own country” Monaco, CCPR/C/MCO/99/1 (2000) para. 205.

⁵⁶ “San Marino Government believes that there are no groups of persons who constitute national minorities, whether ethnic or religious, on the territory, since foreign citizens immigrating to the country for work or other reasons cannot be considered as such.” San Marino, CCPR/C/SMR/3. (2013) p. 88.

⁵⁷ “Iceland has, ever since its settlement in the ninth century, been inhabited by a homogenous population with a common historical, cultural, linguistic and religious origin, and there is no aboriginal population.” Iceland, CCPR/C/ISL/5. (2012) para. 199.

⁵⁸ “France is a country in which there are no minorities and, as stated in the declaration made by France, article 27 is not applicable as far as the Republic is concerned.” France, CCPR/C/76/Add.7. (1997) para. 74.

⁵⁹ “La République d’Haïti n’est pas confrontée aux problèmes de minorités.” CCPR/C/HTI/1 (2014) para. 137. and “Haiti does not have a minority rights problem. All citizens, regardless of origin, live together peacefully in the national territory.” Haiti, CCPR/C/HTI/2 (2018) p. 126.

⁶⁰ “No minority according to this definition can be identified in Rwanda.” Rwanda, CCPR/C/RWA/3. (2007) para. 288.

⁶¹ “[T]he concept of minority and majority does not exist in our legal or social framework.” Nepal, CCPR/C/74/Add.2. (1994) p. 61.

⁶² “Zambia does not have minorities or indigenous groups living within the country that profess or practice their own religion, ethnicity or lingual different from the majority.” Zambia, CCPR/C/ZMB/3. (2006) p. 434.

this regard when it said it did not really know if there were any minorities on its territory since no relevant research had been made on this issue so far. It added, however, that some believe such minorities exist in the country.⁶³

According to our findings, State parties to the ICCPR have three different strategies when referring to the personal scope of Article 27. Most frequently a number of concrete communities are enlisted expressly in periodic reports. 74 countries (58 percent) out of the 128 “non-deniers” have made some sort of direct reference to concrete groups recognized by them as minorities under Article 27, either by expressly mentioning them or including a understandable reference to them in their reports. Other States have provided some sort of legal definition or at least mentioned some elements of it either by citing existing notions of international instruments⁶⁴ or referring to their corresponding domestic legal provisions, or simply trying to clarify their idea on the subject without any existing legal definitions. Thirdly, some States have either remained completely silent or had recourse to the repetition of meaningless generalities. Certainly, the first two approaches can be combined and States in some cases have acted accordingly.

We did not find it necessary to examine how frequently the element that refers to the subject of the definition appears in periodic reports of States, because obviously a minority cannot be anything else but a group. Suffice it to underline the fact that parties refer to such groups by using a diversity of denominations.⁶⁵ Countries of the Americas, for instance, show a great extent of unanimity in using the terms “minority” and “indigenous peoples” as synonyms upon reporting (see Figure 1).

⁶³ “In Tanzania, no government study has been carried out to establish whether these groups exist. Therefore, the issue still needs further discussion and studies to be carried out. There are, however, mixed feelings within the societies as to whether or not these groups exist. Those who believe that these people exist, draw their evidence from minority groups such [as] the hadzabe of the central part of the country—Singida, the Maasai of the eastern part of the country—Arusha.” Tanzania, CCPR/C/TZA/4. (2007) para. 178.

⁶⁴ Such as those included in Article 1(1) of the or in Article 1 of the Convention on providing the rights of persons belonging to ethnic minorities of 1994 of the Commonwealth of Independent States.

⁶⁵ Groups, communities, indigenous peoples are the most frequently used terms but aboriginal people, tribes, minor races, sects, and even foreigners also show up sporadically.

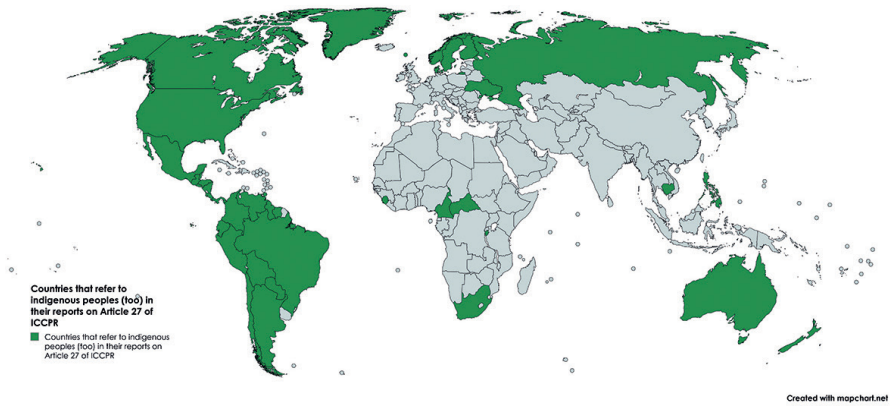


Figure 1. Countries that refer to indigenous peoples too in their reports on Article 27 of ICCPR

Several American countries are parties to the ILO's corresponding treaty and consider the personal scope of Article 27 and the notion of "indigenous peoples" in Convention 169 as identical. Our research has also revealed that the ICCPR-based practice of certain American states also extends to some other groups. This is especially true for Latin American countries with respect to people of African descent,⁶⁶ or, to a lower degree, either to persons with a migratory background⁶⁷ or to religious minorities.⁶⁸ Besides Latin America, indigenous peoples (and sometimes other groups as well) are understood as minorities under Article 27 in Australia, Burundi, Cambodia, Cameroon, Central African Republic, Denmark, Finland, New Zealand, Norway, the Philippines, Russia, Sierra Leone, South Africa, Sweden, and Ukraine.⁶⁹ This

⁶⁶ Chile: "Chilean tribal people of African descent," CCPR/C/CHL/7 (2021) para. 161; Colombia: "Afro-Colombian and aboriginal communities," CCPR/C/103/Add.3 (1996) para. 377; Ecuador: "Afro-Ecuadorians," CCPR/C/84/Add.6 (1997) para. 290; Honduras: "Black peoples," CCPR/C/HND/2005/1 (2005) para. 313., or "Afro-Honduran peoples," CCPR/C/HND/2 (2015) para. 4; Nicaragua: "los pueblos originarios y afrodescendientes" CCPR/C/NIC/4 (2019) para. 18; Panama: "Afro-Panamanian groups," CCPR/C/PAN/4 (2019) para. 247; Paraguay: "persons of African descent," CCPR/C/PRY/3 (2011) para. 176; Peru: "Afro-Peruvian population," CCPR/C/PER/6 (2020) para. 13; and even Uruguay: "Afrodescendent perspective," CCPR/C/URY/6 (2020) para. 28.

⁶⁷ Guyana: "Chinese minority," CCPR/C/GUY/99/2 (1999) para. 94; Panama: "colonies," which are populations made up of descendants of migrants and of indigenous groups," CCPR/C/PAN/4 (2019) para. 245.

⁶⁸ Argentina, CCPR/C/ARG/98/3 (1999) para. 151; Paraguay, CCPR/C/PRY/2004/23 (2004) paras. 603–605.

⁶⁹ Australia: "Aboriginal and Torres Strait Islander peoples," CCPR/C/AUS/98/3 (1999) para. 1353; Burundi: "the Batwa are an indigenous minority population," CCPR/C/BDI/2 (2013) para. 180; Cambodia: "indigenous groups," CCPR/C/KHM/2 (2013) para. 243; Cameroon:

latter country however follows its own approach as it has elaborated a separate definition for indigenous peoples whose main distinctive feature is that they, unlike “national minorities,” do not have a kin-state.⁷⁰ Our data also indicates that especially in Muslim countries (member States of the Organization of Islamic Cooperation) legislators tend to interpret the personal scope of Article 27 in a narrow sense that only covers non-Muslim religious minorities.⁷¹

2.2.2. *Citizenship*

The requirement of holding the citizenship of the country responsible for protecting members of minorities is by far the most widely mentioned criterion in the periodic reports. This, however, does not mean global representativeness since only 39 countries (slightly above 30 percent) require nationality in relation to the legal status of minorities. The vast majority of these States are concentrated in four geopolitical areas, namely Central and Eastern Europe (CEE), the Middle East, Central Asia, and South Asia.⁷² Citizenship is a requirement in 14 countries (70 percent) out of the 20 State parties⁷³ from

“indigenous peoples,” CCPR/C/CMR/5, (2016) para. 149; Central African Republic: “indigenous peoples and minority groups,” CCPR/C/CAF/3 (2018) para. 133; Denmark: “Thule Tribe in Greenland,” CCPR/C/DNK/6 (2015) para. 196; Finland: “Sámi as an indigenous people,” CCPR/C/FIN/6 (2011) para. 56.; New Zealand: “Maori,” CCPR/C/NZL/5 (2008) para. 133; Norway: “Among the so-called ‘settled minorities’,” the Sami people are the only minority group considered to be an indigenous people in Norway.” CCPR/C/115/Add.2. (1997) para. 264; the Philippines: “indigenous cultural communities” and “indigenous peoples,” CCPR/C/PHL/2002/2 (2002), paras. 985–990; Russian Federation: “indigenous peoples,” CCPR/C/84/Add.2 (1995) para. 285; Sierra Leone: “The indigenous population is made up of 18 ethnics groups,” CCPR/C/SLE/1 (2013) para. 19; South Africa: “indigenous languages,” CCPR/C/ZAF/1 (2015) para. 243; Sweden: “The national minorities recognized in Sweden are: Sami, Swedish Finns, Tornedalers, Roma and Jews.” CCPR/C/SWE/2000/5 (2000) para. 130.

⁷⁰ See Article 1. para. 1. of the Law of Ukraine of July 1, 2021 No. 1616-IX about the indigenous peoples of Ukraine: “An ethnic minority within the Ukrainian population that possesses a distinctive language and culture; has traditional social, cultural, or representative structures; considers itself native to Ukraine; and does not have its own state entity beyond Ukraine.” <https://tinyurl.com/mrxmecd>

⁷¹ Bahrain: “religious communities,” CCPR/C/BHR/1 (2017) para. 202 ; Indonesia: “minorités religieuses,” CCPR/C/IDN/1 (2012) para. 389; Iran: “religious minorities,” CCPR/C/IRN/4 (2021) para. 187; Tunisia: “non-Muslim population,” CCPR/C/84/Add.1. para. 247 ; Türkiye: “non-Muslim minorities,” CCPR/C/TUR/1 (2011) para. 225.

⁷² The geographical classification of States is based on the approach of EuroVoc, the EU’s multidisciplinary thesaurus. <https://tinyurl.com/3fbkansr>

⁷³ The Republic of Kosovo is the only country not being a party to the ICCPR from the CEE region mainly due to the disputed nature of its independent statehood.

the CEE region.⁷⁴ Even though they are not CEE countries formally, there are very similar provisions in the laws of Austria,⁷⁵ Greece,⁷⁶ and Turkey⁷⁷ when it comes to the nationality criterion, and for this reason, they can be considered to be part of a wider CEE region in this sense. The proportion is somewhat lower in the Middle East, where five (over 55 percent) out of nine State parties⁷⁸ require citizenship as a precondition for minority status, as well as in South Asia, where only three (50 percent)⁷⁹ out of the six parties have established the criterion in its domestic legislation. The correspondence with the Capotorti definition is the weakest in Central Asia where only two⁸⁰ (33 percent) out of the six countries have a similar provision in their legislation. The citizenship criterion also shows up sporadically in South-East Asia,⁸¹ the Far East,⁸² Africa,⁸³ Western Europe,⁸⁴ and South America.⁸⁵

It is also interesting to note, that in certain countries citizenship is not a requirement, on the contrary, Article 27 only covers the rights of foreigners and/or foreign communities. This “negative citizenship criterion” is part of the legislation in Djibouti,⁸⁶ Cabo Verde,⁸⁷ Kuwait,⁸⁸ Madagascar,⁸⁹ and to some extent in the Republic of Korea.⁹⁰ Apart from the countries referred to above, there are States (not including those that remain silent on the issue) that

⁷⁴ Albania, Armenia, Belarus, Bosnia and Herzegovina, Bulgaria, Czechia, Estonia, Georgia, North-Macedonia, Poland, Serbia, Slovakia, Slovenia, and Ukraine, while Hungary removed this criterion relatively recently.

⁷⁵ Austria, CCPR/C/AUT/4. (2006) para. 440.

⁷⁶ Greece, CCPR/C/GRC/3. (2023) para. 252.

⁷⁷ Turkey, CCPR/C/TUR/1. (2011) para. 410.

⁷⁸ Iran, Iraq, Syria, Turkey, and Yemen. CCPR/C/IRN/3 (2010) para. 1004., CCPR/C/103/Add.2 (1996) para. 85., CCPR/C/SYR/2004/31 (2004), CCPR/C/TUR/1. (2011) para. 410., CCPR/C/82/Add.1. (1993) para. 113.

⁷⁹ Bangladesh, India, and Pakistan. CCPR/C/BGD/1. (2015) para. 276., CCPR/C/10/Add.8. (1983) para. 136., CCPR/C/PAK/1. (2015) para. 217.

⁸⁰ Tajikistan and Uzbekistan. CCPR/C/TJK/2004/11. (2004) para. 300., CCPR/C/UZB/99/1. (2000) para. 364.

⁸¹ Cambodia, CCPR/C/81/Add.12. (1998) para. 382.

⁸² Japan, CCPR/C/JPN/7. (2020) para. 226.

⁸³ Kenya, Lesotho, Liberia, Rwanda and Togo. CCPR/C/KEN/3. (2011) para. 208., CCPR/C/81/Add.14. (1998) para. 152., CCPR/C/LBR/1. (2016) para. 177., CCPR/C/RWA/3. (2007) para. 287., CCPR/C/TGO/2001/3 (2001) para. 385.

⁸⁴ Austria, Greece, Republic of Ireland and Spain. CCPR/C/AUT/4. (2006) para. 440., CCPR/C/GRC/3. (2023) para. 252., CCPR/C/IRL/4. (2012) para. 794., CCPR/C/95/Add.1. (1994) para. 145.

⁸⁵ Peru, CCPR/C/83/Add.1. (1995) para. 376.

⁸⁶ “members of foreign minorities” CCPR/C/DJI/1. (2012) para. 258.

⁸⁷ “foreign populations” CCPR/C/CPV/1. (2018) paras. 271–272.

⁸⁸ “foreign nationals” CCPR/C/KWT/3. (2014) para. 143.

⁸⁹ “foreign minorities” CCPR/C/MDG/2005/31 (2005) para. 459.

⁹⁰ “Chinese and other non-Korean nationals” CCPR/C/114/Add.1. (1998) para. 257.

expressly extend the rights pertaining to the legal status of minorities not only to citizens but well beyond, even to non-nationals.⁹¹

Here it is worth making a brief remark on the possible link between the openness of a country to multiculturalism and the approach of States' domestic public law vis-à-vis the recognition of minorities as existing groups on their territories. Quite probably, countries can be positioned on a continuum on which the most legally intransigent view and thus the most closed attitude is when a country expressly excludes any kind of legal recognition of minorities. A slightly more open stance is when a State reserves this recognition to groups of foreigners. It signals an even more open attitude if the country restricts this legal status to its citizens, and finally, the most open attitude might be the removal of any hurdles of public law when it comes to exercising minority rights. Interestingly, this issue is addressed in some other countries too, not by means of instating citizenship as a requirement, but by creating lower thresholds of public law. The comparative data on the views of countries on the concept of minorities not reflecting the elements of Capotorti's definition also shows the necessity of a degree of permanency in relation to the legal status of minorities. Many countries think that in order to claim such legal status it is necessary to be present on the territory of the State for a longer period. They either fix a definite amount of time for that,⁹² or more frequently, use a wording that refers to stronger ties with the country in question.⁹³

⁹¹ Belgium and Cambodia are worth mentioning here. CCPR/C/BEL/6 (2018). CCPR/C/KHM/3 (2019) paras. 55-56.

⁹² See for example the corresponding requirement of "ethnic groups resident in Hungary for at least one century" in Hungary's relevant legislation: Act CLXXIX of 2011 on the rights of national minorities, Section 1. para. 1.

⁹³ E.g. Albania "Albanian citizens residing in the territory of the Republic of Albania, having early and lasting links with the Albanian state" Article 3. para. 1 of Law Nr. 96/2017 on The Protection of National Minorities in The Republic of Albania, States parties to the "convention on providing the rights of persons belonging to ethnic minorities of 1994" adopted within the framework of the Commonwealth of Independent States: "[...] persons who are constantly living in the territory of one Contracting Party" Article 1., Croatia "whose members have been traditionally settled in the territory of the Republic of Croatia" CCPR/C/HRV/2. (2008). para. 622; Denmark "The Roma do not have status of a national minority in Denmark. The main reason is *the lack of continuous historical presence* in Denmark." Emphasis added. CCPR/C/DNK/6. (2015). para. 199., Estonia "Maintain long-standing, firm and lasting ties with Estonia [...]" CCPR/C/81/Add.5. (1994) para. 237., Indonesia "communautés traditionnelles" CCPR/C/IDN/1. (2012). para. 384., Serbia « population with a lasting and firm connection with the territory of the State" CCPR/C/SRB/2. (2009) para. 512.

2.2.3. Distinctive features, numerical inferiority and non-dominant position

The second most often referred requirement of Capotorti's definition is the one according to which members of such groups should "possess ethnic, religious or linguistic characteristics differing from those of the rest of the population." Again, the CEE region shows the tightest correspondence: here, exactly half of those States who are party to the ICCPR have made a reference to this element.⁹⁴

As for the remaining three elements of Capotorti's definition, they appear only sporadically in State reports. In terms of numerical inferiority, the content analysis shows some correlation, although to an even lesser extent, in the CEE region.⁹⁵ In turn, the "non-dominant position" requirement was referenced by only one country (not in the CEE region).⁹⁶

We may conclude that State practice as well as perhaps legal conviction reflect the elements of Capotorti's definition in the CEE countries the most, at least according to the periodic reports submitted to the HRC. Other than that, the correspondence between the practice of States and Capotorti's definition is rather weak or uncertain (see Figure 2).

⁹⁴ Albania, Armenia, Belarus, Bosnia and Herzegovina, Croatia, Czechia, Hungary, Serbia, Ukraine. Albania, CCPR/C/ALB/2. (2011). para. 593.; Armenia, CCPR/C/92/Add.2 (1998) para. 252; Article 1. of Belarus: Law No. 1926-XII of 1992 on National Minorities; Article 3. of the Law on the Rights of National Minorities in Bosnia and Herzegovina; Croatia, CCPR/C/HRV/2 (2008) para. 622; Article 2 of Act on the Rights of Members of National Minorities in the Czech Republic; Serbia, CCPR/C/SRB/2 (2009) para. 512; Section 1. para. 1. of Act CLXXIX of 2011 on the rights of national minorities (Hungary); Ukraine, CCPR/C/UKR/99/5 (2000) para. 694.

⁹⁵ Czechia: "they represent a minority of citizens," Act on the Rights of Members of National Minorities in the Czech Republic, Article 2; Hungary: "who are in a numerical minority amongst the population of the State," Section 1. para. 1. of Act CLXXIX of 2011 on the rights of national minorities; Peru: "numerical importance," CCPR/C/83/Add.1 (1995) para. 376; Rwanda: "sufficiently representative, although smaller in number than the rest of the population of that State or a region of the State" CCPR/C/RWA/3 (2007) para. 287; Serbia: "in a minority position" CCPR/C/SRB/2 (2009) para. 512.

⁹⁶ Peru, CCPR/C/83/Add.1 (1995) para. 376.

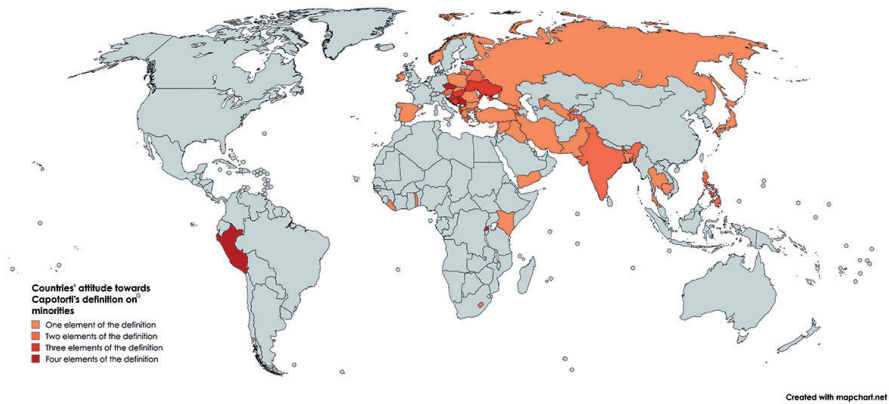


Figure 2. Countries attitude towards Capotorti's definition on minorities⁹⁷

3. The practice of the Human Rights Committee

In this section, we examine the practice of the Human Rights Committee through its relevant general comment (No. 23), concluding observations adopted under the reporting procedure, and views as well as decisions adopted under the individual communications procedure.

Before moving on to the analysis, three preliminary remarks must be made. First, when it comes to individual communications, the overwhelming majority of cases based on Article 27 and decided on the merits concern indigenous peoples (whereas the provision does not even mention the term “indigenous”). For instance, the Committee explicitly recognized as minorities the Sami in Sweden and Finland, the Maori in New-Zealand, and several First Nations (“Indian”) groups in Canada. Bearing in mind the obvious differences between the two groups and the distinct legal frameworks governing their status, we do consider that ultimately both categories are autochthonous minorities,⁹⁸ thus at least some of the findings regarding indigenous peoples can also be applied analogously to national minorities.

⁹⁷ Here, we considered the first element of the Capotorti definition – the subject: group – as a given, so our map shows the inclusion of individual elements, in different combinations, out of the remaining five conceptual elements.

⁹⁸ To be precise, not all indigenous peoples constitute a minority, but when they do, they are protected under Article 27. See, HRC: General Comment No. 23, para. 3.2.; *Poma Poma v. Peru*, Communication No. 1457/2006, Views of 27 March 2009, CCPR/C/95/D/1457/2006, para. 7.2. The fact that indigenous peoples may qualify as minorities for the purposes of Article 27 is irrespective of the assertions by some that they are not minorities but have a different and special status under international law. See, e.g. *A. D. v. Canada*, Com. No.

Second, the HRC generally do not deal with conceptual issues within the individual communications procedure. Instead, it simply accepts the facts as submitted by the authors that we have a certain minority or indigenous people at hand. For example, in the *Whispering Pines Band* case, the Committee established that “[t]he Whispering Pines Indian Band belongs to the Shuswap Nation in south-central British Columbia. The Shuswap are the indigenous people of the region and constitute a single social, cultural, political and linguistic community distinct both from Euro-Canadians and from neighbouring indigenous peoples.”⁹⁹ In this respect, the HRC’s concluding observations on State reports provide more insight into the Committee’s approach.

Third, the issue of defining minorities is complicated by the fact that the right to self-determination under Article 1 could affect the interpretation of Article 27 (and Articles 25 and 26), as pronounced by the HRC in *Diergaardt et al. v. Namibia*¹⁰⁰ and *Mahuika et al. v. New Zealand*.¹⁰¹ In light of the established case-law of the HRC and its General Comment No. 23, Article 1 is not justiciable under the Optional Protocol on individual communications, as it confers a right on “peoples” and not on individuals.¹⁰² Therefore, the Committee holds that it has no competence to consider a submission alleging a violation of the right to self-determination, and until 2000 it effectively refused to interpret Article 1 of the ICCPR. However, in the two above-mentioned cases, the HRC expressed the novel view that it can take Article 1 into account when interpreting Article 27 (and Articles 25 and 26), which it in fact did for the first time in *Gillot v. France*,¹⁰³ in the context of minority participatory

78/1980, CCPR/C/OP/1, Decision of 29 July 1984, para. 7.3. (concerning the Mikmaq tribal society). Cf. Joseph – Castan (2013) 839.

⁹⁹ *R. L. et al. (Whispering Pines Band) v. Canada*, Com. No. 358/1989, CCPR/C/43/D/358/1989, Decision of 5 November 1991, para. 2.1. In this chapter, we did not consider the issue of operationalization, although indigenous cases offer useful guidelines in this respect. To summarize the HRC’s respective views, whether somebody belongs to a minority depends on objective criteria (language, religion, ethnic characteristics, cultural customs, etc.) as well as the subjective feeling of the person concerned. In this context, possible (non-)recognition by the national legal system is of subsidiary significance. For more details on this see Nagy – Vizi (2024); Nowak (1993) 13–14.

¹⁰⁰ *Diergaardt et al. v. Namibia*, Com. No. 760/1997, CCPR/C/69/D/760/1997, Views of 25 July 2000, para. 10.3.

¹⁰¹ *Mahuika et al. v. New Zealand*, Com. No. 547/1993, CCPR/C/70/D/547/1993, Views of 27 October 2000, para. 9.2.

¹⁰² This is why we do not know whether the German-speaking population of South Tyrol constitutes a “people” within the meaning of Article 1 of the ICCPR, as the authors had no right to submit a claim under that article. *A.B. et al. v. Italy*, Com. No. 413/1990, CCPR/C/40/D/413/1990, Decision of 2 November 1990.

¹⁰³ *Gillot v. France*, Com. No. 92/2000, CCPR/C/75/D/932/2000, Views of 15 July 2002.

rights.¹⁰⁴ Not even in this case, however, did the Committee give a definition of “peoples,” let alone “minorities,” or the interrelationship between the two concepts.¹⁰⁵ In any case, exploring the possible ramifications of the interpretation of Article 1 on the conceptualization of minorities would exceed the scope of this chapter, so we decided to exclude it from our analysis.

For the sake of comparability, the structure of this section resembles that of the previous one, so the relevant statements of the HRC will be organized according to the elements of the Capotorti definition: the *existence* of a group (to be fully in line with the text of Article 27), numerical inferiority, non-dominant position, the citizenship criterion, distinctive features (ethnicity, religion, language, culture), and solidarity.

3.1. Existence of a group

In its often-quoted general comment on Article 27, the Committee dealt with conceptual issues only indirectly and briefly. Importantly, it declared that “[t]he existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.”¹⁰⁶ The Committee repeatedly highlighted this principled statement in several individual communications.¹⁰⁷ While General Comment No. 23 does not provide further guidance as regards to these objective criteria (beyond a common culture, religion or language), it does declare that States cannot refuse to recognize their minorities by simply referring to the principle of non-discrimination.¹⁰⁸

¹⁰⁴ Verstichel (2005) 31.

¹⁰⁵ *Gillot v. France*, para 13.16. The General Comment on the right to self-determination of peoples is also silent on the notion of ‘peoples’. See, HRC: General Comment No. 12: Article 1 (Right to Self-determination). 13 March 1984.

¹⁰⁶ HCR: General Comment No. 23, para. 5.2. It is an entirely different issue, but O’Nions is correct in pointing out that the allocation of resources may in fact depend on the legal recognition by the State, and therefore the protection of minority identity is in practice dependent on the official recognition of the group. O’Nions (2007) p. 195.

¹⁰⁷ E.g. *J.G.A. Diergaardt et al. v. Namibia*, Com. No. 760/1997, CCPR/C/69/D/760/1997, 6 September 2000, para. 10.6., and Individual Opinion of Elizabeth Evatt and Cecilia Medina Quiroga (concurring).

¹⁰⁸ “Some States parties who claim that they do not discriminate on grounds of ethnicity, language or religion, wrongly contend, on that basis alone, that they have no minorities.” HCR: General Comment No. 23, para. 4. “[T]he mere fact that equal rights are granted to all individuals and that all individuals are equal before the law does not preclude the existence in fact of minorities in a country.” *France*, CCPR/C/79/Add80 (1997), para. 24. Cf. Individual opinion of Mrs Rosalyn Higgins in *T.K. v France*, Com. No. 220/1987, 8 November 1989. On the HRC’s view on the related French “declaration” excluding the applicability of Article 27

During the assessment of periodical reports, the Committee expressed concern about the attitude of those States that refused to recognize the existence of minorities in their territories;¹⁰⁹ recognized only certain minorities;¹¹⁰ or applied a narrow concept of minorities, thus confining protection only to their linguistic¹¹¹ or national minorities,¹¹² and not to all ethnic, linguistic and religious minorities. The Committee did not approve the assertion of some States that claimed that minorities are so integrated into the country's culture that they cannot be considered as such.¹¹³ Oftentimes the Committee explicitly named and requested information or clarification about the status of certain groups, which were regrettably not recognized by their respective countries, such as the Berbers in Algeria; the Macedonians in Bulgaria; the Mapuche in Chile; the Baka people in Gabon; the "scheduled tribes" in India; the Travellers in Ireland; the Roma in Italy; the Koreans, Chinese, Ainus, Burakumin, Okinawa and Ryukyu in Japan; and large national groups (Portuguese, Italian, French, German and Belgian) in Luxembourg.¹¹⁴

When it comes to the existence of an ethnic, religious or linguistic minority in the territory of a State, the Committee is adamant that this should

in France, and its refusal to examine the Breton communications on the merits with regard to Article 27. See Spiliopoulou Åkermærk (1997) 164–169; Nowak (2005) 641–642.

¹⁰⁹ For instance, the Committee was "unable to agree that France is a country in which there are no ethnic, religious or linguistic minorities." France, CCPR/C/79/Add.80 (1997), para. 24. Other examples include Burundi, A/48/40 (1993), paras. 58 and 69; Egypt, A/48/40 (1993), para. 694; Gambia, A/39/40 (1984), paras. 343 and 361; Kuwait, CCPR/CO/69/KWT (2000), para. 14; Luxembourg, A/41/40 (1986), para. 76; San Marino, CCPR/C/SMR/CO/2 (2008), para. 16; Senegal, CCPR A/53/40 (1998), para. 66; Uruguay, CCPR/C/79/Add.90 (1998), para. 12; Zaire, A/42/40 (1987), para. 289.

¹¹⁰ Austria, CCPR/C/79/Add.103 (1998), para. 14; Germany (FRG), A/41/40 (1986), para. 307 (recognition only of the Danish in Schleswig-Holstein); Mongolia, CCPR/C/79/Add.120 (2000), para. 17 (recognition only of the Khazakhs); Slovenia, CCPR/C/79/Add.40 (1994), para. 12 (Italians and Hungarians are singled out for special protection as minorities, Gypsies receive some protection but immigrants none).

¹¹¹ Italy, A/49/40 (1994), para. 281.

¹¹² Estonia, CPR/C/79/Add.59 (1995), para. 23; Russia, A/50/40 (1995), paras. 384 and 401; Ukraine, A/50/40 (1995), para. 322.

¹¹³ Algeria, A/47/40 (1992) para. 276; Dominican Republic, CCPR/CO/71/DOM (2001), para. 20. Yet, the HRC accepted Senegal's argument that due the "cultural and social intermingling," there are no minorities in the country: Senegal, CCPR/C/103/Add.1 (1996), para. 12.

¹¹⁴ Algeria A/47/40 (1992) paras. 276 and 298; Bulgaria A/34/40 (1979) paras. 130 and 146; Chile A/34/40 (1979) 106; Gabon CCPR/CO/70/GAB (2000) 17; India A/39/40 (1984) 267; Ireland, CCPR/C/IRL/CO/3 (2008), para. 23; Italy CCPR/C/ITA/CO/5(2006) 15(e); Japan A/37/40 (1982) 75, 91; Japan CCPR/C/JPN/CO/5 (2008) 32; Japan CCPR/C/JPN/CO/6 (2014) 26; Luxembourg A/41/40 (1986) 76.

not be a matter of policy or law but one of fact.¹¹⁵ This fact, in turn, must be established by objective criteria, which include the very features that make a minority distinct from other groups of the society, and thus constitute a separate element of the Capotorti-definition (see below at Section 3.5).

3.2. Numerical inferiority

A year before General Comment No. 23 was adopted, the HRC published its views in the *Ballantyne, Davidson and McIntyre v. Canada* case, which remains the only individual communication to date where the HRC directly addressed the issue of what is a minority. The authors of the communication challenged legislation in Quebec that prohibited the use of any other language than French in commercial signs. The submission raised the question whether English speakers within the province of Quebec qualify as a minority for the purposes of Article 27. In a contested decision, the Committee concluded that English-speaking people in Quebec are not entitled to minority rights, since “the minorities referred to in article 27 are minorities within a [ratifying] State, and not minorities within any province. A group may constitute a majority in a province but still be a minority in a State and thus be entitled to the benefits of Article 27. English-speaking citizens of Canada cannot be considered a linguistic minority.”¹¹⁶ Thus, a minority is a group that is numerically inferior within the State as a whole, and not merely numerically inferior within one province or region. Therefore, a group which forms a majority in a State can never be classified as a minority, which raises the issue of oppressed majorities.¹¹⁷

Several committee members were unhappy with the views of the majority, including Mr. Bertil Wennergren who considered that “the issue of what constitutes a minority in a State must be decided on a case by case basis, due regard being given to the particular circumstances of each case”—no insights were offered concerning the case at issue.¹¹⁸ Another individual opinion was

¹¹⁵ E.g. San Marino, CCPR/C/SMR/CO/2 (2008), para. 16.

¹¹⁶ *Ballantyne, Davidson and McIntyre v. Canada*, Com. Nos. 359/1989 and 385/1989, Views of 31 March 1993, para. 11.2. The Committee confirmed that its observations apply *mutatis mutandis* to the merits of the very similar *Singer* case, however, without touching upon the issue of regional minorities or Article 27. *Singer v. Canada*, Communications No. 455/1991, Views of 26 July 1994, CCPR/C/51/D/455/1991, para. 12.1.

¹¹⁷ Such as the black majority in South Africa. Cf. Joseph – Castan (2013) 835; Nowak (2005) 644.

¹¹⁸ *Ballantyne, Davidson and McIntyre v. Canada*, Individual opinion by Mr. Bertil Wennergren.

written by four committee members, who disagreed with the majority decision because it interpreted the concept of minorities in strictly numerical terms. However, during the controversial history of the protection of minorities in international law, many different criteria have been proposed, which the HRC did not take into consideration. Alternatively, as the dissenting committee members rightly pointed out, Article 50, which envisages the application of the ICCPR to “parts of federal States” could affect the interpretation of Article 27: “To take a narrow view of the meaning of minorities in Article 27 could have the result that a State party would have no obligation under the Covenant to ensure that a minority in an autonomous province had the protection of Article 27 where it was not clear that the group in question was a minority in the State considered as a whole entity.”¹¹⁹

3.3. Non-dominant position

Being in a weaker position refers not only to political power, but also to economic, cultural or social status.¹²⁰ The fact that minority groups are non-dominant, vulnerable, marginalized, etc. compared to the majority population, is apparent from the many references to persons belonging to minorities in the context of discrimination, xenophobia, hate speech or persecution, unequal access to health, education, employment and welfare services, the lack of full political participation, etc.¹²¹ (All this naturally weakens the enjoyment of other Covenant rights.) In fact, most individual communications under Article 27 also include alleged violations under Articles 2 and 26. Yet, it seems that the Committee does not treat the factor of non-dominance as a conceptual element of minorities (neither does the text of Article 27, for that matter), and General Comment No. 23 contains no reference to power relationships whatsoever.¹²² This is all the more intriguing because, to us, non-dominance in a society seems the only feature that truly distinguishes minorities from

¹¹⁹ *Ballantyne, Davidson and McIntyre v. Canada*, Individual opinion by Mrs. Elizabeth Evatt, cosigned by Messrs. Nisuke Ando, Marco Tulio Bruni Celli and Vojin Dimitrijevic.

¹²⁰ Nowak (2005) 644.

¹²¹ Practically all materials referenced in Section 3 could be mentioned here as well; for a list of relevant concluding observations, see Taylor (2020) pp. 790–791.

¹²² Not even when laying down the requirement of positive measures to secure minority identity. HRC: General Comment No. 23, paras. 6.1–7, 8. Of course, it is a well-known argument in scholarship that such positive measures “are necessary in order to make certain that any disadvantages arising out of minority status are remedied, and that assimilationist pressures are counteracted.” Joseph and Castan (2013) p. 865.

majority groups, in fact, it can be considered as the *differentia specifica* of the concept of minority.¹²³

3.4. Citizenship

In its General Comment No. 23, setting out from the statement that “the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language,” the HRC famously claimed that Article 27 does not require members of a minority group to be citizens of the State party.¹²⁴ For the Committee, “[g]iven the nature and scope of the rights envisaged under [Article 27], it is not relevant to determine the degree of permanence that the term ‘exist’ connotes,” since under Article 2(1) States are required to ensure that the rights protected under the ICCPR are available to all individuals subject to their jurisdiction, except rights which are expressly applicable to aliens (Article 13) or citizens (Article 25). Thus, Article 27 also entitles non-nationals, including migrant workers or even visitors.¹²⁵ The Committee’s support for such a broad concept of minorities is also evident from the reporting procedure, where it regularly asks questions on immigrants under the consideration of Article 27.¹²⁶

Hannum points out that when drawing up its general comment, the HRC did not refer to the *travaux préparatoire* of the ICCPR; however, if one examines the meaning of minority at the time when the treaty was being drafted, s/he will come to a quite different conclusion.¹²⁷ In fact, the annotations on the draft of the two Covenants, prepared by the Secretary-General in 1955, are quite clear about the agreement that the minority clause (then article 25)

¹²³ That this factor does matter in practice is apparent from the preparatory materials of the ICCPR, where several delegations pointed out that “the protection of minorities was not meant to derogate from the principle of majority rule; there were regions, such as certain parts of Africa, which were dominated by privileged minorities and article [27] was not intended to protect such domination.” UN General Assembly: *Draft International Covenants on Human Rights. Report of the Third Committee*. A/5000, 5 December 1961. p. 35, para. 123. Thus, due to its dominant position during apartheid, the white population of South Africa could not be protected under Article 27. Nowak (2005) 644.

¹²⁴ HRC: General Comment No. 23, para. 5.1.

¹²⁵ HCR: General Comment No. 23, paras. 5.1, 5.2. This interpretation is further confirmed in *General Comment No. 15 on the Position of Aliens Under the Covenant*, adopted on 11 April 1986, para. 7: “In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language.”

¹²⁶ E.g. Australia, A/38/40 (1983), paras. 156–157. Cf. Spiliopoulou Åkermark (1997) 146.

¹²⁷ Hannum (2012) 60.

“should cover only separate or distinct groups, well-defined and long-established on the territory of a State”.¹²⁸ The document adds that it was also understood that the provisions concerning the rights of minorities “should not be applied in such a manner as to encourage the creation of new minorities or to obstruct the process of assimilation”¹²⁹—a clear indication that immigrants are not protected. Pentassuglia also agrees that the Committee’s expansive view on the notion of minorities is not entirely persuasive and not supported by the practice of State parties, including State reports submitted to the Committee.¹³⁰ Our findings presented in Section 2 corroborate this opinion.¹³¹

The Committee has also been critical towards those States that may not require citizenship, but impose similarly strict conditionality on the recognition of minorities, which embodies stronger ties between the country and the groups worthy of protection. For instance, Hungary requires that a group should have lived in its territory for at least a century in order to qualify as a national or ethnic minority. The Committee suggested repealing this condition, “so that nomadic and other groups that do not satisfy the requirement due to their lifestyle are not excluded from the full protection of the law.”¹³² Similarly, requesting a traditional area of settlement in particular regions seems “much too restrictive” to the Committee, who considers that Article 27 also applies to those who are not concentrated or settled in a particular area or region, including immigrants or who have been given asylum.¹³³

3.5. Distinctive features

Article 27 applies to “ethnic, religious or linguistic” minorities. It is safe to concur with Taylor, who finds it sufficient that the minority possesses only

¹²⁸ UN General Assembly: UN Doc. A/2929, 1 July 1955, p. 181, para. 184. Cited by Hannum (2012) 61.

¹²⁹ UN Doc. A/2929, p. 182, para. 186.

¹³⁰ Pentassuglia (2000) 18–36; Pentassuglia (2002) 60–61.

¹³¹ Furthermore, we agree with Nowak in pointing out that the Committee’s “extremely liberal interpretation” is based on “a fairly restrictive understanding of the ‘nature and scope’ of the rights envisaged under Article 27. If the protection of minorities implies special rights and corresponding positive State obligations, it would be difficult to argue that every foreigner visiting a country as a tourist should be entitled to invoke these rights. On the other hand, if the protection of minorities does not go beyond the general right to equality and non-discrimination, [...] the legitimate question as to the added value of Article 27. arises.” Nowak (2005) p. 647.

¹³² Hungary, CCPR/C/HUN/CO/5 (2010), para. 22.

¹³³ Germany, CCPR/C/79/Add.73 (1996), para. 13.

one of these distinctive characteristics.¹³⁴ In addition to ethnicity, religion and language, culture can be mentioned here, which features in the text of Article 27, although not as a qualifier of a minority group, but as a right to be protected. To some commentators, the term “ethnic” covers cultural and historical elements,¹³⁵ and therefore goes hand in hand with culture. Interpretations are divided over the relationship between ethnic, national and even racial¹³⁶ minorities, but ethnicity is usually understood as the broadest category, covering the other two,¹³⁷ which is why—to the Committee, anyways—indigenous peoples and immigrant groups can also come under the personal scope of Article 27, even when they do not differ from the majority in religion or language.

In the Committee’s view, culture may manifest itself in a way of life which is closely associated with territory and the use of its resources, including traditional economic and social activities, such as fishing, hunting and the right to live in reserves protected by law. This may be particularly relevant for members of indigenous communities constituting a minority.¹³⁸ However, whereas culture may include economic activities, “economic activities per se do not equate with cultural activities.”¹³⁹ For instance, in the *Diergaardt* case, the Rehoboth Basters could not demonstrate any cultural/spiritual attachment to cattle grazing beyond its plainly economic purpose, thus the HRC did not find them to be sufficiently ‘distinctive’ to activate Article 27.¹⁴⁰ Importantly, culture is not a static concept, and may evolve without inevitably

¹³⁴ Taylor (2020) 795.

¹³⁵ Nowak (2005) 649; Taylor (2020) 798.

¹³⁶ The case of Muslim Moroccan immigrants in the Netherlands could have been illustrative in this respect, but the Committee decided not to examine the claim under Article 27. *Rabbae, A.B.S and N.A. v. the Netherlands*, CCPR/C/117/D/2124/2011, Views of 14 July 2016, para. 9.9.

¹³⁷ Cf. e.g. Nowak (2005) 649.

¹³⁸ GC 23 paras. 3.2. and 7; *Lovelace v. Canada*, Com. No. 24/1977, Views of 30 July 1981 (living on a reserve); *Kitok v. Sweden*, Com. No. 197/1987, CCPR/C/33/D/197/1985, Views of 27 July 1988, para. 9.2 (reindeer husbandry); *Ominayak and Lubicon Lake Band v. Canada*, Com. No. 167/1984, Views of 26 March 1990, para. 32.2; *I. Länsman v. Finland*, CCPR/C/52/D/511/1992, 26 October 1994, paras. 9.1. and 9.5 (reindeer herding); *J. E. Länsman et al. v. Finland*, CCPR/C/58/D/671/1995, 30 October 1996, para. 10.2 (reindeer husbandry); *Mahuika et al. v. New Zealand*, CCPR/C/70/D/547/1993, 27 October 2000, para. 9.3 (fishing); *Diergaardt et al. v. Namibia*, para. 10.6; *Howard v. Canada*, CCPR/C/84/D/879/1999, 26 July 2005 (fishing); *Poma Poma v. Peru*, paras. 7.2–7.3 (raising llamas).

¹³⁹ [Joseph – Castan (2013) p. 849]

¹⁴⁰ “Although the link of the Rehoboth community to the lands in question dates back some 125 years, it is not the result of a relationship that would have given rise to a distinctive culture. Furthermore, although the Rehoboth community bears distinctive properties as to the historical forms of self-government, the authors have failed to demonstrate how these factors would be based on their way of raising cattle.” *Diergaardt et al. v. Namibia*, para.

losing the protection of Article 27.¹⁴¹ Thus, Article 27 not only protects traditional means of livelihood of minorities, but also adaptations of those means to the modern way of life and ensuing technology.¹⁴²

Language can also be a distinctive characteristic of minorities, and it is also part of culture. For instance, in *Mavlonov and Sa'di v. Uzbekistan*, press and education in the minority language were found to be essential elements of the Tajik minority's culture.¹⁴³

Religion is another important distinctive characteristic for certain minority groups. Here, the personal scope of Article 27 becomes especially interesting, since freedom of religion of everyone (including persons belonging to minorities) is protected by Article 18 of the ICCPR. However, the purpose of Article 27 is different: "ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned."¹⁴⁴ In this context, the Committee accepted, inter alia, that the use of cannabis was "inherent to the manifestation of the Rastafari religion" in South Africa,¹⁴⁵ just like fishing was a fundamental aspect of Maori religion (and culture, see above).¹⁴⁶

3.6. Solidarity

The only subjective element in the Capotorti-definition—that is, to show, if only implicitly, a sense of solidarity, directed towards preserving the distinctive characteristics of a given minority group—does not feature in the text of Article 27. Perhaps this is the reason why the Committee's practice has been more explicit concerning objective factors, nevertheless, it does attach great importance to a subjective element: the self-identification of a group. Accordingly, in its concluding observations on Denmark, the Committee

10.6. For a more illuminating explanation of how distinctiveness is determined, see the concurring opinion of Elizabeth Evatt and Cecilia Medina Quiroga in the same case.

¹⁴¹ Taylor (2020) 799.

¹⁴² E.g. *I. Länsman v. Finland*, para. 9.3; *Mahuika et al. v. New Zealand*, para. 9.4.

¹⁴³ *Mavlonov and Sa'di v. Uzbekistan*, CCPR/C/95/D/1334/2004, 19 March 2009, para. 8.7. Usually, however, the Committee is reluctant to consider language-related complaints under Article 27, at least when it comes to the communications procedure. See, for example *Raihan v. Latvia*, CCPR/C/100/D/1621/2007, 28 October 2010, paras. 8.3–8.4; *Bulgakov v. Ukraine*, CCPR/C/106/D/1803/2008, 29 October 2012, paras. 7.2–7.3. Of course, observations regarding language minorities are abundant in the reporting procedure. See Joseph – Castan (2013) 861–864; Taylor (2020) 802–804.

¹⁴⁴ HRC: General Comment No. 23, para. 9. Cf. Taylor (2020) 804.

¹⁴⁵ *Prince v. South Africa*, CCPR/C/91/D/1474/2006, 31 October 2007, para. 7.2.

¹⁴⁶ *Mahuika et al. v. New Zealand*, para. 8.2.

noted with concern that the Supreme Court “did not recognize the Thule Tribe of Greenland as a separate group capable of vindicating its traditional rights, despite the tribe’s own perception to the contrary.”¹⁴⁷

4. Concluding remarks

The comparative analysis of State parties’ periodical reports shows a great variety of legal approaches in relation to the personal scope of Article 27 of the ICCPR that, at least indirectly, also weakens the idea of an emerging customary international legal norm on the definition of minorities. That statement is especially true if customary international law is only considered a universal set of norms. However, just like treaty law, customary international law is territorially fragmented, so besides universal norms, there are also regional and subregional customary regimes and even bilateral customary norms.

Even though Capotorti’s definition is not reflected in the worldwide practice of States, nor is it part of their legal conviction, it has not remained without influence at least in some sub-regions, including first and foremost the CEE region and the Middle East, South Asia, and South-East Asia. In these regions, countries are either not that much affected by international migration as countries of destination, or they are simply rather uninterested, more closed societies. They tend to regulate issues under Article 27 in an exclusive way that favors groups whose members have certain stronger—legal, emotional or historical—ties with the country they reside in. This “conservative” approach lives together with other views, since in many Western countries it has been gradually replaced by a more inclusive notion of minorities, which tries to expand the personal scope of Article 27. to other communities too, such as immigrants¹⁴⁸ or in some cases even to the LGBTIQI+ community,¹⁴⁹ though it is yet unclear if this latter community could fall under the

¹⁴⁷ Denmark, CCPR/C/DNK/CO/5 (2008), para. 13. (concerning the Thule Tribe of Greenland).

¹⁴⁸ See e.g. the State report of Belgium, CCPR/C/BEL/2003/4 (2003) para. 1.2: “The notion of ‘ethnic and cultural minorities’ is a complex one, encompassing the following target groups: ‘allochthons’ (immigrants), people of recognized refugee status, new arrivals speaking foreign languages (asylum-seekers and individuals arriving for purposes of family reunification or family establishment), nomads (travellers and gypsies) and people living illegally in Belgium.”; Finland, CCPR/C/FIN/6 (2011) para. 254: “Integration of immigrants”.

¹⁴⁹ See, e.g. the State report of Liberia, CCPR/C/LBR/1 (2016) paras. 182–184; or that of Finland, CCPR/C/FIN/6 (2011), paras. 77–81: “Sexual and gender minorities.”

category of ethnic, religious or linguistic minorities.¹⁵⁰ Besides, especially in the Americas, countries include indigenous peoples under the scope of Article 27, while others restrict the applicability of this provision only to religious communities.

Despite the fact that this is not supported by the reports expressly, we think that the common ground for this great diversity of State practice might be the relationship of all these groups to the power practiced by central State organs. Putting it more simply, all these groups are in a non-dominant position in their respective societies and this single fact might form a basis for their recognition as minority communities.

Against the backdrop of the long-term influence of Capotorti's definition on the practice and legal thinking of countries, especially the CEE region can be highlighted. The tightest correlation between the Capotorti-definition and the States' own notions of minorities can be identified in the countries of this region, yet it is still unclear which came first, the chicken or the egg. It might easily be the case that the international community either directly or indirectly exerted an enormous influence on these countries after the end of the Cold War and for this reason, legislators in these States took the easy way out by adopting similarly phrased definitions in their domestic law. Likewise, it is also probable that these countries were active enough during Capotorti's work in the 1970s and based on their societal realities disproportionately influenced the views of the UN's rapporteur. Our research obviously could not support either view.

The Human Rights Committee's approach—although it has changed a lot over the decades in many ways—looks more coherent than State practice. First, its relevant case-law points in the direction of a more inclusive concept of minorities, one that seems to be more in line with the approach of Western countries. Moreover, the HRC also accepts the view of many countries that "indigenous peoples" can also be beneficiaries of minority rights as guaranteed by Article 27 of the ICCPR. This approach needs to be understood within the framework of a recent trend in international jurisprudence to reconceptualize certain ethno-cultural groups, including indigenous peoples and national or ethnic minorities. Based on the practice of especially the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights, Pentassuglia confirms an expansive concept of indigeneity, including, "in addition to criteria of self-identification, territorial connection, and cultural distinctiveness, notions of social marginalisation,

¹⁵⁰ For the sake of clarity, one should note that the issue of sexual and gender minorities is indicated not in the part that clarifies Finland's obligations under Article 27 but in those paragraphs which demonstrate the country's efforts in fighting discrimination.

discrimination and non-dominance.”¹⁵¹ As we mentioned above, this latter factor may be the one that unites otherwise vastly different communities under the umbrella term of minorities.

As our chapter has shown, the lack of a universally adopted legal definition of minorities is well reflected in the divergent views both between individual States as well as between States and the Human Rights Committee. However, considering minorities as a societal category, it seems unavoidable that the concept has a different meaning depending on time, location and other circumstances. The very nature of minorities as a fluid, changing, constantly re-evaluated social (and thus legal) category provides the *raison d’être* for research like this one.

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¹⁵¹ Pentassuglia (2018) 18; Pentassuglia (2023) 255–258.

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Indigeneity: a model for conceptualization and operationalization

Abstract. *The aim of this chapter is to show how Indigenous law and the legal concept of indigeneity can provide instructive insights to discussions on how law conceptualizes and operationalizes race, ethnicity, or nationality. This chapter provides an overview of the political ethics behind theorizing Indigenous exceptionalism, the unique constitutional fiction of tribal sovereignty and legal pluralism, as well as novel designs of land rights, and tribal membership governance. It shows unexampled models of (settler) states initiating and recognizing “biologized” classifications of tribal descent in a unique interplay of self-identification, community acceptance and “objective”, criteria-based conceptualizing and operationalizing Indigenousness. Following an overview of the morphology and a systematic analysis of the teleology of the international and domestic legal landscapes on Indigenous peoples, the discussion turns to case studies for the dissection of synonymic legal and political interpretations of race, color, religion and indigeneity, and subsequently, to the five ways of operationalizing indigeneity (by the tribes, via self-identification, through external perception, through “objective” criteria, and by proxies). Finally, a separate subsection focuses on various forms of contestations in the context of recognizing new “first nations” and subgroups, reverse passing and the question of multiple identities.*

Keywords: *conceptualization, Indigenous, race, self-identification, sovereignty*

1. Introduction

This chapter focuses on indigenous law as part of a larger, comparative project¹ on how law conceptualizes and operationalizes various interrelated concepts and the *fateful nonagon* (a nine-sided polygon) of *difference*² that includes

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¹ The results of which will be published in Pap (2025) (forthcoming).

² Paraphrasing Mercer (2017).

race, ethnicity, nationality, caste, color, indigeneity, descent, disability (if it pertains to an inheritable medical condition with high visibility), and class (especially structurally sound socioeconomically disadvantaged positions).

The project entangles two dimensions: first, classifications pertaining to the groups, and second, how membership criteria are established in these communities, where five operationalizing schemes are identified: self-identification, external perception, community-identification, “objective” criteria, and *via* proxies. The overall framework of the analysis is that conceptualization, operationalization (including contestation) and policy regimes and legal institutions are connected and interdependent.

The text provides an overview of the political ethics behind theorizing Indigenous exceptionalism, the unique constitutional fiction of tribal sovereignty and legal pluralism, as well as novel designs of land rights, and tribal membership governance. It shows unexampled models of (settler) states initiating and recognizing “biologized” classifications of tribal descent in a unique interplay of self-identification, community acceptance and “objective” criteria-based conceptualizing and operationalizing Indigeness.

Indigenous law is unique in the sense that it involves “objectively” defined group membership schemes, setting forth rigid and explicit blood-quantum-based requirements for the indigenous communities. Here the state either provides strict administrative definitions using some kind of objective criteria, or it officially endorses tribal norms.

The analysis of the conceptualization of Indigenous/aboriginal communities and the operationalization of membership in these groups begins with disclaimers pertaining to the limitations of the analysis. Following a terminological clarification, the second section provides a brief overview of the international and domestic legal landscapes on Indigenous peoples. Following this, first, the legal fiction of Indigenous sovereignty and the subsequent reality of plural legal systems will be explored. After unwrapping the political ethics behind theorizing Indigenous exceptionalism, a delineation of various elements of the legal regimes follows, exploring territorial autonomy and other forms of land rights, special political institutions, special legal regimes, and symbolic action on behalf of the majority, as well as the limitations of tribal sovereignty intersecting with the multicultural discourses on harmful traditional practices and environmentalism. Having distinguished between constitutional, political, territorial, financial and symbolic forms of compensation, the analysis turns to case studies to dissect synonymic legal and political interpretations of race, color, religion and indigeneity.

The next section discusses the five ways of operationalizing indigeneity (by the tribes, via self-identification, through external perception, with

“objective” criteria, and by proxies.) Finally, a separate subsection focuses on various forms of contestation in the context of recognizing new “first nations” and subgroups, reverse passing and the question of multiple identities.

This analysis has no ambition to encompass the entirety of Indigenous legal regimes, or even to provide a comprehensive enumeration or typology of the various Indigenous communities worldwide, because the history, claims, grievances and constitutional and political environments for the Sami in Northern Europe, aboriginal communities in New Zealand or Australia, Indigenous populations in Africa or South-America, Asia, or first nations in North America are vastly different. Due to spatial (and epistemological) limitations, this chapter only undertakes the task of carrying out textual biopsies, pointing to certain common features and connections in regulatory mechanisms.

2. Conceptualizing indigeneity in law and politics

Today, nearly half a billion people qualify as Indigenous. If they were to form a single country, it would be the world’s third most populous nation, behind China and India.³ A 2021 UN report on the “State of the World’s Indigenous Peoples,” held that eighty-six per cent of Indigenous people live in Asia, Africa, and the Pacific.⁴

The first, preliminary question pertains to terminology: given the topical and geographic location, the subjects of the discussion at hand are often simultaneously referenced as “aboriginal”, “Indigenous”, “First Nation”, or “native.” The common element is that the “nativity” of most of these communities (but not all of them, see for example Northern Europe’s most notable Indigenous population, the Sami) relates to the context of colonization, which brought along diverse regimes of brutal oppression and the imposition of an alien form of governance, social structure and culture. Hence, the concept of Indigenous rights is rooted in the moral and political expression of the wrongfulness of colonization, as well as in the commitment to compensate for some of the grievances and to recreate a spatial and a legal framework for the descendants of the oppressed to continue (or reimagine) exercising some crucial elements of their traditional lifestyles, which include cultural practices and rights to engage in pre-industrial traditional agro-economic activities (such as hunting and fishing).

³ Singh (2023).

⁴ State of the World’s Indigenous Peoples: Rights to Lands, Territories and Resources, United Nations Department of Economic and Social Affairs, 2021, <https://tinyurl.com/2vubthrp>

It is important to emphasize that here (unlike in the case of national minorities) there is no direct power-sharing political pressure and no underlying concern for national or international security. When the political and legal recognition of Indigenous claims began, we nowhere saw threats of a destabilizing civil war, secession or even an emerging political force that had powerful potential for interest advocacy. Addressing the historical wrongs done to Indigenous communities, thus appears to be predominantly motivated by moral forces, which accentuate the discursive and rhetorical framework of the post-WWII global political order that builds on the universality of human rights and dignity. The recognition of the collective rights of precolonial societies as first nations is in fact a unique exemption from the gold standard of individual human rights in international law (and international political discourse), which was center to post-WWII international collaboration, as epitomized by the creation of the United Nations, envisaged as the instrument of preventing a deadly, potentially globally destructive world war in the wake of the Cold War. It is important to bear in mind that the principle of individual human rights as a grand narrative and master ideology was actually a replacement of collective rights for (national) self-determination, which turned out to be an unsustainable political principle on the global level, given the irresolvable territorial overlapping of nationalist projects. As the League of Nations—established after WWI as the first worldwide intergovernmental organization with the mission to maintain world peace, building on the principle of national self-determination and the adjacent recognition of (national) minority rights—was a dramatic failure, leading to an even more devastating world war;⁵ the recognition of collective rights and self-determination was taken off the menu for international standards. (Due to international security concerns, around the time of the fall of the Soviet Union and the communist bloc in Europe and the Yugoslav wars, minority rights made a comeback, but more as regional instruments tailored to meet particular political specificities and not as universal norms of international law.)

So far, we have established the moral-political positioning of Indigenous rights. The subsequent pages show what the substance of these legal, political and policy frameworks is, what the demographic and geographic scope is of these frameworks, and, finally, what the “cost” of these commitments is.

Given the size and the noted diversity of legal instruments in the domestic regimes, an overview of the detailed content of Indigenous law exceeds the ambition of this chapter. The analysis is limited to and proceeds as follows: The subsequent subsection will show the international (minimum) framework

⁵ See for example Hannum (2001).

and a few select country-models. Indigenous law and adjacent policies provide diverse territorial, financial and symbolic forms of compensation for colonialist sins. A unique feature of Indigenous law pertains to a peculiar symbolic constitutional discourse, framing Indigenous legal regimes under the concept of tribal, first nation sovereignty and commitments to a special form of legal pluralism. Another unique Indigenous-specific legal institution pertains to land rights (including novel forms of ownership and access). Additionally, there are specially modified versions of legal regimes (which can be traced back to demands by national minorities advocated since the 19th-century in Europe) such as reservations as unique forms of territorial autonomy; special forms of cultural autonomy (including the right to use language in public terrains and affairs, the right for own educational institutions); Indigenous histories to be included in the national curriculum; preferential treatment in political representation (including advisory and consultative mechanisms and instruments); self-determination in membership and internal rules for the community, and being recognized as a separate partner to the state in several relations. Besides these frameworks, we see a mainstreamed recognition of special needs that Indigenous people have in the terrain of anti-discrimination law and religious freedom. There are further regimes designed to accommodate Indigenous communities (which can target other groups as well) with regard to preferential treatment in education, hiring in public procurement, etc. Furthermore, there are unique special forms of symbolic recognition in pledges and increased sensitivity for cultural identities (including an awareness of cultural appropriation.) Also, the legal protection of indigenous peoples also includes and intertwines with the protection of biological diversity, land and the ecological system and climate protection. A further characteristic of the indigenous law framework lies in that similarly to national minorities, both international legal regimes and indigenous communities openly reject the need to define indigeneity in general terms and apparently are at ease with occasionally using the concepts of national minorities, race and ethnicity as overlapping ones.

As for the “cost” of recognizing Indigenous rights as frameworks for land were first developed, the conflict with massive industrial (extraction and agricultural) interests, which are now the focal points of Indigenous advocacy (in deforestation, the extraction industry, including the building of pipelines), arguably did not seem to be relevant or foreseeable. Preindustrial land cultivation, hunting and fishing posed no threat to modern industry and commerce, as most of these traditional spaces for Indigenous life were believed to be situated in vast, densely populated and industrially non-prioritized forests, mountains, deserts, etc. Let us take a closer look at the inventory of the legal regimes!

2.1. The international legal landscape

Domestic and international legal frameworks for the recognition of Indigenous rights developed simultaneously.⁶ As mentioned above, the initiatives did not root in international security concerns, or organized stakeholder advocacy.

2.1.1. *Endeavors by the ILO*

The first important and binding international document was adopted under the auspices of the International Labour Organization (ILO), founded in 1919, the oldest of the specialized agencies of the United Nations system (actually predating the establishment of the UN in 1945), which operates under a unique structure involving governments (currently 175 Member States), representatives of employers and workers. The ILO was the first international body to address Indigenous issues since the early 1920s. The Indigenous and Tribal Populations Convention (No. 107) was adopted in 1957, as the first comprehensive international instrument setting forth the rights of Indigenous and tribal populations and the obligations of ratifying States. The ILO's supervisory system does not set forth complaints mechanisms by individuals or general NGOs, including Indigenous organizations, but procedures may be invoked by employers' or workers' organizations on behalf of or concerning Indigenous organizations, communities or individuals on the grounds that a Member State failed to observe or has not satisfactorily ensured the application of a ratified Convention. Furthermore, Member States must provide periodic reports to the International Labour Office, describing the measures taken to implement the provisions of those Conventions they have ratified. In the case of the relevant conventions the reporting cycle is five years and the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) may also ask States to submit interim reports, particularly if there are ongoing issues of concern.

Although its mere existence is a historic milestone, the 1957 Convention used a "patronizing language" as the ILO later saw it, referring to Indigenous populations as "less advanced" and promoting an assimilationist approach. True, the convention identifies as its goal to "facilitate action to assure the [...] progressive integration of Indigenous and other tribal and semi-tribal

⁶ From the rich literature on this consider for example: Lixinski – Åhrén – Charters – Hohmann (2024); Erueti (2022); Hohmann – Weller (2018); Åhrén, (2016); Anaya (2009); Rodríguez-Piñero (2005).

populations.” Article 1 defines the target community as “(a) members of tribal or semi-tribal populations [...] whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions.”

The convention sets forth government responsibility for “the protection of the institutions, persons, property and labour,” adding that “due account shall be taken of the cultural and religious values and of the forms of social control existing among these populations [...] when they undergo social and economic change.” The document sets forth that “these populations shall be allowed to retain their own customs and institutions where these are not incompatible with the national legal system or the objectives of integration programmes [...] The right of ownership, collective or individual, of the members of the populations [...] over the lands which these populations traditionally occupy shall be recognized [...]. The populations [...] shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations [...] When [...] removal of [...] is necessary as an exceptional measure, they shall be provided with lands of quality (and) [...] shall be fully compensated for any resulting loss or injury.” The convention also sets forth that “children [...] shall be taught to read and write in their mother tongue ... alongside a progressive transition [...] to the national language.”

Although the convention had been ratified by only 31 states (Angola, Argentina, Bangladesh, Belgium, Bolivia, Brazil, Colombia, China, Costa Rica, Cuba, Dominican Republic, Ecuador, Egypt, El Salvador, Ghana, Guinea-Bissau, Haiti, India, Iraq, Malawi, Mexico, Pakistan, Panama, Paraguay, Peru, Portugal, Syrian Arab Republic, Tunisia), its political importance and effect for domestic legislation is important.⁷

Reflecting on the “the developments which have taken place in international law since 1957, as well as developments in the situation of Indigenous and tribal peoples in all regions of the world,”⁸ ILO updated the international standards and removed the “assimilationist orientation” of the earlier document, and adopted a new, binding Indigenous and Tribal Peoples Convention, (No. 169) in 1989, “Recognising [...] aspirations [...] to exercise control over their own institutions, ways of life and economic development and to

⁷ Some states have withdrawn ratification, see <https://tinyurl.com/2p94622e>

⁸ Preamble of the 1989 Convention.

maintain and develop their identities, languages and religions [...] [and] Calling attention to the distinctive contributions of Indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding.”

The 1989 convention also states that “Self-identification as Indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply,” and calls governments to “Establish means for the full development of these peoples’ own institutions and initiatives,” and sets forth that “These peoples shall have the right to retain their own customs and institutions [...] methods [...] for dealing with offences committed by their members shall be respected [...]. The rights of ownership and possession [...] over the lands which they traditionally occupy shall be recognised.”

The convention also requires governments to take appropriate measures, to facilitate contacts and co-operation between Indigenous and tribal peoples across borders; it recognizes and protects the social, cultural, religious and spiritual values of Indigenous and tribal peoples, and respects the integrity of their values, practices and institutions. It also establishes the right of Indigenous and tribal peoples to develop their own institutions; to decide their own priorities for the process of development and to exercise control over their own economic, social and cultural development; and requires States to take Indigenous and tribal custom and customary law into account when applying national laws and regulations. The adoption of the new convention closes the earlier document for new ratification, but it remains valid for those countries that have ratified it but have not ratified the new one. As with the 1957 document, the number of countries ratifying the 1989 convention is quite low (24 states: Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Germany, Guatemala, Honduras, Luxembourg, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, Venezuela),⁹ but the significance and the informal effect goes beyond its actual binding force.

2.1.2. Endeavors by the UN

The next step in the codification of Indigenous rights under the auspices of the UN took place in 2007, with the adoption of a comprehensive, although non-binding declaration by the General Assembly, the United Nations

⁹ See Convention, <https://tinyurl.com/2p94622e>

Declaration on the Rights of Indigenous Peoples (UNDRIP), establishing a universal framework of minimum standards for the survival, dignity and well-being of the Indigenous peoples—who were involved in its drafting. The preamble begins with concerns over the fact that “Indigenous peoples have suffered from historic injustices as a result of, *inter alia*, their colonization and dispossession of their lands, territories and resources” and recognizes “the urgent need to respect and promote the rights of Indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States” and “also that respect for Indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.” It also welcomes the “fact that Indigenous peoples are organizing themselves for political, economic, social and cultural enhancement” and states that “constructive arrangements between States and Indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character” and in several occasions refers to “partnership” and “cooperative relations” between Indigenous peoples and States. In connection to this, the Declaration accepts that “Indigenous peoples possess collective rights” and “the right of self-determination,” by virtue of which they can “freely determine their political status and freely pursue their economic, social and cultural development.” Furthermore, “in exercising their right to self-determination, (they) have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions” and the “right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions.”

The Declaration reiterates that Indigenous peoples shall not be forcibly removed or relocated from their lands or territories without free, prior and informed consent and an agreement on just and fair compensation and, where possible, with the option of return. The Declaration also sets forth the right to practice and revitalize their cultural traditions and customs, as well as the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains, and that “States shall provide redress [...] restitution, developed in conjunction with Indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs,” as well as that “States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair,

transparent and effective mechanisms developed in conjunction with Indigenous peoples concerned.” The document also guarantees the right to establish and control educational systems and institutions providing education in their own languages, and ensuring that State-owned media duly reflect Indigenous cultural diversity (and privately-owned media is also encouraged to do so).

The Declaration proclaims the right to consultancy and participation in decision-making in matters which would affect their rights, (in order to obtain free, prior and informed consent before adopting and implementing legislative or administrative measures) through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision-making institutions. Under the auspices of the right to determine and develop priorities and strategies for exercising their right to development, Indigenous peoples should “have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.” The Declaration also states the right to traditional medicines and to maintain “health practices, including the conservation of their vital medicinal plants, animals and minerals,” and that “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”

As for land rights, the Declaration sets forth that “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired” and that they “have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.” Furthermore, the storage or disposal of hazardous materials on Indigenous land is prohibited without free, prior and informed consent.

The Declaration states that “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual

and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”

The Declaration also sets forth that Indigenous peoples, “have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.”

The Declaration was adopted by a recorded vote of 143 in favor to 4 against (Australia, Canada, New Zealand and the United States of America), with 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine), but all four countries that voted against have since expressed support.¹⁰

Besides the Declaration, there are further important UN-instruments: the mandate of a Special Rapporteur on the rights of Indigenous Peoples was established in 2001, along the United Nations Permanent Forum on Indigenous Issues, a high-level advisory body to the Economic and Social Council, established in 2000. To provide an opportunity for Indigenous Peoples to share their experiences and raise their concerns at the UN, in 1982 the Working Group on Indigenous Populations (WGIP) was established as a subsidiary organ to the Sub-Commission on the Promotion and Protection of Human Rights. In 2007 it was replaced by the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP).¹¹

It needs to be added that, following a long debate, the term and concept of “Indigenous peoples” was intentionally not defined in the Declaration, based on the curious rationale that “the identification of an Indigenous people is the right of the people itself—the right of self-identification and a fundamental element of the right to self-determination. Indigenous peoples’ situations and contexts are highly variable; any single definition will not fully capture the full range and diversity of the Indigenous peoples of the world.”¹²

Asserting that a definition of the term “Indigenous peoples” was neither necessary nor useful, as no universally agreed definition existed, and no single definition could fully “capture the characteristics of Indigenous populations.”

One of the most cited descriptions of the concept was given by Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his Study on the Problem of Discrimination against Indigenous Populations. According to

¹⁰ United Nations (2019) 3.

¹¹ Indigenous Peoples at the United Nations, <https://tinyurl.com/3zs3df72>

¹² United Nations (2019) 4.

this, "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system [...]. This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors: a) Occupation of ancestral lands, or at least of part of them; b) Common ancestry with the original occupants of these lands; c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an Indigenous community, dress, means of livelihood, lifestyle, etc.); d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language); e) Residence on certain parts of the country, or in certain regions of the world; f) Other relevant factors. [...] On an individual basis, an Indigenous person is one who belongs to these Indigenous populations through self-identification as Indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group)."¹³ "This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference."¹⁴

During the many years of debate at the Working Group on Indigenous Populations, observers from Indigenous organizations developed a common position and rejected the idea of a formal definition of Indigenous peoples that would be adopted by States. For example, such statements have been issued: "We, the Indigenous Peoples present at the Indigenous Peoples Preparatory Meeting on Saturday, 27 July 1996, at the World Council of Churches, have reached a consensus on the issue of defining Indigenous Peoples and have unanimously endorsed Sub-Commission resolution 1995/32. We categorically reject any attempts that Governments define Indigenous Peoples."¹⁵

Similarly, governmental delegations expressed the view that it was neither desirable nor necessary to elaborate a universal definition of Indigenous peoples. Finally, at its fifteenth session, in 1997, the Working Group concluded

¹³ UN Doc. E/CN.4/Sub.2/1986/7. The study was launched in 1972 and completed in 1986.

¹⁴ United Nations (2004).

¹⁵ Doc. E/CN.4/Sub.2/1996/21.

that a definition of Indigenous peoples at the global level was not possible at that time, and certainly not necessary for the adoption of the Draft Declaration on the Rights of Indigenous Peoples.¹⁶

As a UN document concludes “In the sixty-year history of developing International Law within the United Nations system, various terms have not been formally defined, the most vivid examples being the notions of ‘peoples’ and of ‘minorities.’ [...] The lack of formal definition of ‘peoples’ or ‘minorities’ has not been crucial to the Organization’s successes or failures in those domains nor to the promotion, protection or monitoring of the rights recognized for these entities [...] in the case of the concept of ‘Indigenous peoples,’ the prevailing view today is that no formal universal definition of the term is necessary. For practical purposes the understanding of the term commonly accepted is the one provided in the {noted Special Rapporteur Martínez Cobo study}.”¹⁷

2.1.3. Regional endeavors

Alongside the aforementioned universal international instruments, a notable regional framework exists in the Americas. In 2016, the American Declaration on the Rights of Indigenous Peoples was adopted after nearly 30 years of advocacy and negotiation (including Indigenous representatives from across the hemisphere) by the Organization of American States (OAS), a regional intergovernmental organization of 35 member countries of the Americas, including the United States. The non-binding Declaration offers protection for Indigenous peoples in North America, Central and South America, and the Caribbean. The document further develops the universal framework. It begins by stating that “the rights of Indigenous peoples are both essential and of historic significance to the present and future of the Americas.” Cultural autonomy is extended to public affairs, as the Declaration sets forth that “The states, in conjunction with Indigenous peoples, shall make efforts to ensure that those peoples can understand and be understood in their languages in administrative, political, and judicial proceedings” and that “ensure that Indigenous persons living outside their communities, particularly children, may have access to education in their own languages and cultures (and that) the curricula of state educational systems reflect the plural-cultural and multilingual nature of their societies and encourage respect for

¹⁶ United Nations (2004).

¹⁷ United Nations (2004) paras 7–8.

and knowledge of the different Indigenous cultures. States shall, in conjunction with Indigenous peoples, promote intercultural education that reflects the worldview, histories, languages, knowledge, values, cultures, practices, and ways of life of those peoples.”

Indigenous peoples also have the right to preserve their family systems and States need to respect “the various Indigenous forms of family [...]. In matters relating to custody, adoption, severance of family ties, and related matters [...] determining the best interests of the child, courts and other relevant institutions shall take into account the right of every Indigenous child [...], to enjoy his or her own culture.” As for political autonomy, “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs [...] [and they also] have the right to [...] maintain [...] juridical systems.” As for national proceedings, they are entitled to “linguistic and cultural interpreters.” The Declaration has a very specific position on treaties and other agreements, setting forth that “Indigenous peoples have the right to the recognition, observance, and enforcement of the treaties, agreements and other constructive arrangements concluded with states and their successors, in accordance with their true spirit and intent in good faith” and that “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.” The Declaration also proclaims that “The collective intellectual property of Indigenous peoples includes [...] traditional knowledge and traditional cultural expressions including traditional knowledge associated with genetic resources, ancestral designs and procedures, cultural, artistic, spiritual, technological, and scientific, expressions, tangible and intangible cultural heritage, as well as the knowledge and developments of their own related to biodiversity and the utility and qualities of seeds and medicinal plants, flora and fauna.”

2.2. National legal frameworks

Given the impossibility of overviewing the entirety of the vastly diverse national legal and policy frameworks, this section will proceed as follows: following a short description of some of the models for judicial, legislative and constitutional approaches to Indigenous rights, the various legal regimes will be grouped according to the substance (claims, protections and privileges), distinguishing between instruments that are unique and specific to Indigenous peoples (such as the constitutional concept of Indigenous sovereignty, plural legal systems, land rights, special measures for adoption, symbolic

speech acts, special sensitivity for cultural appropriation) and those that exist in similar forms in relation to other groups and where institutional regimes “learn from one another” (such as affirmative action in education, employment, territorial autonomy, cultural autonomy, affirmative measures in political representation, special recognition within the lenses of religious freedom). The discussion then will turn to the limitations of accommodating Indigenous autonomy under the conceptual framework of harmful traditional practice and the principle of gender equality, as well as other forms of legal and policy paternalism and arguments pertaining to environmentalism.

2.2.1. Constitutional, legislative and judicial recognition

2.2.1.1. Constitutions

Indigenous people’s rights can be recognized on the constitutional level, by legislation, formal agreements with governments or as outcomes of judicial decisions. Models and frameworks vary vastly. In some countries, such as Bolivia, Guatemala, Peru and Ecuador, Indigenous peoples actually constitute a majority.¹⁸

In a number of countries, constitutions formally recognize the identity and rights of Indigenous peoples. For example, Bolivia’s Law No. 3760 in 2007 integrated the Declaration on the Rights of Indigenous Peoples into domestic legislation. The 2009 Constitution is one of the most comprehensive instruments for recognizing Indigenous peoples’ rights, including the right to self-determination, recognizing Indigenous legal systems, collective ownership and autonomous management of Indigenous lands, as well as the right to prior consultation by the State regarding any legislative or administrative measures that affect the country’s Indigenous populations, which extends to the exploitation of natural resources in their territories. Also, in addition to Spanish, all 36 Indigenous languages spoken in the country are recognized as official languages.

Costa Rica affirms the “multi-ethnic and plurinational” character of the country and guarantees the maintenance and cultivation of the national Indigenous languages.

The 2008 Constitution of Ecuador establishes an intercultural, plurinational and plurilingual State and recognizes 21 collective rights for Indigenous peoples, including communal ownership of their lands and autonomy in governing Indigenous territorial constituencies; political participation in

¹⁸ Beckman – Gover – Mörkenstam (2022) 16.

official bodies through Indigenous representatives; the right of free, prior and informed consent with regard to plans and programs governing the disposition of resources located on their traditionally occupied lands; the right to participate in the profits earned from related projects; the right to receive compensation for any social, cultural and environmental damages caused; the right to learn in their own language and cultural environment through an intercultural bilingual education system. Also, the constitution declares that the Declaration on the Rights of Indigenous Peoples is directly applicable and enforceable.

El Salvador amended its Constitution in 2014 to recognize Indigenous peoples and committed to adopting public policies aimed at maintaining and developing Indigenous identity.

The Political Constitution of the United Mexican States, adopted in 1917, was amended in 2011 and 2016 to incorporate several references to the rights of Indigenous peoples, including the right to self-determination through the autonomous exercise of internal government in accordance with their traditional rules, procedures and customs, and the right to elect Indigenous representatives for the town council in municipalities with Indigenous populations. The authorities in Mexico are constitutionally obligated to consult Indigenous peoples when preparing national, state and local development plans.

The 2014 reform of the Constitution of Nicaragua introduced provisions recognizing the political-administrative, social and cultural autonomy of the Indigenous peoples and ethnic communities of the Atlantic coast and guaranteeing the preservation of their cultures, languages, religions and customs. The Constitution also guarantees Indigenous peoples the right to benefit from their natural resources, the effectiveness of their collective rights to property, and the freedom to elect their own authorities and representatives.¹⁹

In Africa, the Central African Republic is the only country that ratified the 1989 ILO Convention (in 2010), but in 2011, Congo adopted Act No. 5-2011 on the Promotion and Protection of the Rights of Indigenous Peoples. The 2010 constitutional amendments in Kenya make reference to traditional, Indigenous communities that have maintained a traditional hunter-gather lifestyle and livelihood, and nomadic and settled pastoral communities, and provide for a range of civil, political, socio-economic and collective rights. The 2011 constitution in Morocco recognizes the Amazigh (Berber) Indigenous language, Tamazight, as an official language of the country. Niger and Chad have developed pastoral codes (laws to protect pastoralists) and in the latter

¹⁹ United Nations (2019) 9–11.

country, institutions have been created to meet the educational and health needs of nomadic, island and hard-to-reach children.²⁰

In the Arctic region, the traditional territories of the Sámi and the Inuit peoples are situated in a number of different countries. The Sámi and the Inuit are recognized as Indigenous peoples in Finland, Norway, Sweden, and the Kola Peninsula in the northwestern part of the Russian Federation. In Finland, Norway and Sweden, Sámi autonomy and self-government are exercised through the respective Sámi parliaments, and they have established a joint cooperative body, the Sami Parliamentary Council. The Swedish constitution recognizes the Sámi as “peoples” having the right to self-determination.²¹

The constitution of the Russian Federation guarantees Indigenous peoples’ rights to maintain and develop various aspects of their culture, the protection of the natural environment and traditional way of life of small ethnic communities and the distinctive social, economic and cultural development of the country’s Indigenous small-numbered peoples, protecting their natural environment, traditional way of life, livelihoods and crafts.²²

Indigenous peoples are identified in the Constitution of Nepal, in laws in Cambodia and Japan, in the 1997 Indigenous Peoples Rights Act in the Philippines, in policy instruments in Thailand, and through existing legislation and an agreement in Bangladesh. The 2008 Constitution of the Republic of the Union of Myanmar grants rights to “national races,” some of which have used the term “Indigenous” to define themselves. In 2008, the Japanese government recognized the Ainu people as the Indigenous people of Hokkaido.²³

2.2.1.2. Treaties and interpretations

In several countries, mostly former British colonies, Indigenous law, land rights, or rights and obligations are rooted in treaties between settlers and tribes. When interpreting the actual content of these treaties, unique, Indigenous-specific legal instruments developed, in order to achieve a more intensive and extensive inclusion of Indigenous peoples and perspectives.

In the former British colonies, such as Canada, New Zealand, Australia, the US (and to a certain degree, South-Africa, Malaysia, Botswana, Belize and Kenya) courts have played an important role in developing the jurisprudential concept of the Aboriginal/Indigenous native title, which, although

²⁰ United Nations (2019) 9–12.

²¹ United Nations (2019) 12–13. See the chapter by Balázs Dobos in this volume.

²² United Nations (2019) 13–11.

²³ United Nations (2019) 13–14.

based on international law, has its roots in common law. Here, high court decisions in one country had direct influence in others.²⁴

The starting point, declared by a 1823 US Supreme Court decision (*Johnson v. McIntosh*²⁵), is the doctrine of discovery (adopted in Australia, Canada, New Zealand and the United States vis-à-vis their Indigenous peoples) under which, according to international (and domestic) law, when a European Christian nation “discovered” new lands, it automatically gained sovereignty and property rights over the non-Christian, non-European peoples, even though these Indigenous peoples and nations were already using and occupying the lands. Thus, a discovering European country gained exclusive property rights that were to be respected by other European countries and which pre-empted other European countries from the same rights.²⁶ Consequently, European countries regarded South and North America (and later Australasia) as vacant land, vacuum domicilium, available for taking from the Indigenous peoples even if they were occupying and using the land.²⁷

In the 1973 *Calder*-case,²⁸ however, the Canadian Supreme Court overruled the notion of the innate superiority of European nations, according to which Aboriginal peoples were too primitive to be recognized as sovereign nations and that consequently North America was terra nullius.²⁹ One of the culminating points for Aboriginal rights was the 1992 Australian High Court *Mabo* (no. 2)-case, which, for the first time, recognized the existence of Native Title and rejected the terra nullius principle in Australia.³⁰ As Barrie argues, “Aboriginal peoples through landmark decisions of the courts were jolted out of the old paradigm of juridical exclusion into a new paradigm of juridical inclusion. They also found entry to negotiation rooms. Land claims suddenly became systemic. Aboriginal title, referred to as ‘native title’ [...] developed fresh offshoots in fraternal jurisdictions. Aboriginal peoples overnight became rights-bearing members of their respective legal systems.”³¹

The cornerstone of this legal framework is the aforementioned concept of “native title” or “native title rights and interests,” referring to communal, group or individual rights and interests of Indigenous and aboriginal peoples

²⁴ Barrie (2021) 46.

²⁵ 21 U.S. 543 (1823).

²⁶ Barrie (2021) 9–11.

²⁷ Barrie (2021) 11.

²⁸ *Calder v. British Columbia* (AG) [1973] SCR 313, [1973] 4 WWR 1.

²⁹ Barrie (2021) 13.

³⁰ *Mabo v. Queensland* (No 2) [1992] HCA 23; (1992) 175 CLR 1.

³¹ Barrie (2021) 46

in relation to land or waters, as set forth by traditional laws and customs observed.³²

Another source of Indigenous law in common law countries stems from treaties made between the colonizing governments and native/Indigenous people, or First Peoples' of Turtle Island (the name some Indigenous peoples use to reference North America) on a nation-to-nation basis, though these agreements are usually not adjudicated as a treaty under principles of international law.

In the 1996 *Van der Peet*-case,³³ the Supreme Court of Canada also clarified the relationship between Aboriginal title and Aboriginal rights, as "aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land." Aboriginal rights are the legal embodiment of Aboriginal peoples' claims to their traditional lands and the ability to engage in traditional activities and customs. Aboriginal rights relate to activities that are an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming that right. Aboriginal title is a right in land, but it is also more than the right to engage in specific activities which may be themselves aboriginal rights. It confers the right to use land for a variety of activities, some may go beyond practices, customs and traditions integral to the distinctive cultures of aboriginal societies.³⁴ The highly visible gambling facilities (open to and generating revenues from non-native Americans) in the US are examples for this. Aboriginal title is the special legal interest that Aboriginal peoples possess in lands based on their historic occupation. It is a right to the land itself, as developed by common law doctrine. Thus, "aboriginal title" is a set of legal principles developed by courts, referring to the property-based rights of Indigenous peoples, as they exist after a settler state has acquired sovereignty over Indigenous territories, but which are recognized to continue.³⁵

Terminology is far from uniform. Often, aboriginal law is distinguished from Indigenous law, the former referring to the body of international and domestic law pertaining to Indigenous peoples, and the latter meaning Indigenous peoples' own legal systems.³⁶ (The discussion of "Indigenous law" here, for simplicity's sake, includes both.) Also, communities are referenced differently: tribal groups in New Zealand's Maori are known as "iwi" or "hapu" (hapu are smaller sub-tribes), the legal term for the Australian Indigenous clans and moieties that hold native title is "native title holding community",

³² Barrie (2021) 21.

³³ *R v. Van der Peet* [1996] 2 S.C.R. 507.

³⁴ Barrie (2021) 30.

³⁵ Webber (2006) 174.

³⁶ Brown (2023) 178–179.

in the United States for Native Americans the term “tribe” is used, and in Canada the terms “First Nation” and “Self-governing Aboriginal Community” are used to describe the communities of Indians, Metis and Inuit governed by the Indian Act or parties to self-governance arrangements.

An important trigger for the ever deeper involvement of courts was that unfolding the true “common intention” between Indigenous signatories and the British Crown has been a troubling task in a colonial context which often misrepresented the words of Indigenous signatories, with colonial officers saying one thing to communities when working towards the adoption of a treaty, and recording a different point on the written treaty document.³⁷ Discovering genuine treaty intentions is a persistent challenge. For example, even in the 2020s, novel procedural institutions incorporating tribal traditions are introduced in court hearings in Canada, such as oral testimonies provided by tribal Elders, rearranging seating to be in a circular or semi-circular fashion instead of a traditional hierarchical European courtroom setting, a sacred council fire continually burning during trial proceedings, or bringing the sacred pipe of the Grandfather Pipe ceremony into the courtroom. Arguably, these go beyond accommodating cultural practices.³⁸

Court decisions as well as treaties were subsequently transposed to legislation and even constitutions. Section 35 of the 1982 Canadian Constitution Act states that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”. To be more specific, “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

2.2.2. Indigenous-specific legal and policy measures

Protections and privileges pertaining to Indigenous communities and their members can be grouped into two types: those specific and unique to Indigenous peoples and measures that exist in the inventory of international and domestic legal frameworks, but Indigenous communities are also included—sometimes with specially tailored formations. The subsequent subsection will provide an overview of the substance and content of “Indigenous law” in the broad sense, beginning with *sui generis*, unique, Indigenous-specific instruments, which can take the form of special constitutional and symbolic recognition, special forms of territorial autonomies and land rights, and other

³⁷ Brown (2023) 179. Also see O’Brien – Pan – Sheikh – Prideaux (2023) 173–176.

³⁸ Brown (2023) 185.

measures pertaining to the various segments of life, such as adoption or rules for businesses. The aim of these legal acts, as discussed above, is to provide justice: symbolic, political-representative, and redistributory-compensatory.

2.2.2.1. *The (fictitious) constitutional concept of Indigenous sovereignty*

A unique feature of Indigenous law, most prominently in the US, is the usage of the term sovereignty and self-determination in relation to Native Americans. Sovereignty is the core concept for nation states both in the international legal as well as the domestic constitutional and political theoretical context, whereas self-determination is a principle of independence and inviolability in the international plane, and the identification of the sacrosanct political entity in the domestic sense. It possibly includes the right to secession (which is not recognized internationally in a unilateral form), as well as the fundamentals of the constitutional structure of the state, whether it is built on democratic, popular or other grounds, etc., as well as the source and outreach of the state's political and legislative powers. The term is not used lightly. Except for Indigenous peoples.

International law builds on the sovereign equality of (nation) states (as expressed in Article 2(1)–(5) of the Charter of the United Nations),³⁹ and there is no general right under international law to the recognition of (new) sovereign entities. The very idea of sovereignty, whether in the external or the internal dimension is that it relates to an indivisible source and entity, as it pertains to the source and outreach of state power. Even if there are autonomous or federal entities and power-sharing constructions, the very concept of sovereignty refers to the source and capacity of ultimate power and political (and legal) authority. It is, thus, difficult to comprehend, from the constitutional point of view, what American legal languages pertaining to (retained or restored) tribal and Indigenous sovereignty means. Still, tribes have been recognized as possessing inherent sovereign powers to self-govern, and to engage in treaty-making as an equal party. (In the US, the first pan-tribal recognition exercise took place in the mid-1930s as part of the implementation of the Indian Reorganization Act, and more tribes were formally recognized after 1970, with the beginning of the so called self-determination policy.)⁴⁰ According to the American doctrine of a unique, inconsistent and troubling interpretation of sovereignty, tribes exercise retained sovereignty—except where it is inconsistent with the overriding territorial sovereignty of the United States, or has expressly been limited by Congress.⁴¹ Thus, Native

³⁹ See for example Koskeniemi – Kari (2020).

⁴⁰ Gover (2009) 12.

⁴¹ Gover (2009) 16.

American tribes are not subject to the constitution of the United States, and are, as Gover points out,⁴² described by the Supreme Court as “domestic dependent nations,”⁴³ or as “quasi-sovereigns,”⁴⁴ and as “[u]nique aggregations possessing attributes of sovereignty.”⁴⁵ As Gover underlines, “The practical extent of tribal sovereignty is matter of common law, and so is built incrementally through judicial determinations. It is constantly evolving as new cases are decided.”⁴⁶

What is meant by “sovereignty” is a broad set of autonomies pertaining to tribal land and issues involving tribal members, such as the authority to design tribal constitutions and choose the form of tribal government, to pass criminal and civil laws for internal governance including the regulation of domestic relations between tribal members, to exercise judicial jurisdiction over matters occurring on the reservation, to exclude persons from the reservation, and to regulate the use of tribal land. Tribes do not retain inherent judicial jurisdiction over non-Indians in criminal cases, although they do have such authority over Indians, including non-member Indians.⁴⁷ These autonomies are, again, constituted by US federal and state legislation, such as the 1975 Indian Self-determination and Educational Assistance Act, which authorizes tribes to take over the administration of programs in law enforcement, education, social services, health, and infrastructural development that had been managed by the federal Bureau of Indian Affairs and the Indian Health Service.⁴⁸

However, neither tribal autonomy nor self-determination has much to do with sovereignty. These concepts involve autonomy in certain internal matters and exemptions from federal, US involvement, but as the subsequent discussions on the limitations on Indigenous autonomy will show, these freedoms are always subject to federal recognition, occasional overrule in the internal dimension, and are certainly non-existent in terms of international affairs or competences. What the actual content of Indigenous sovereignty appears to be is a strong form of symbolic recognition, a fiction of constitutional law, and a substitute for constitutional identity. (The term Native Americans only appear in the US Constitution in the listing of the competences of Congress to regulate commerce with Indian tribes, and when appropriating electoral

⁴² Gover (2009) 16.

⁴³ *Cherokee Nation v. Georgia* 30 U.S. 1(1831).

⁴⁴ *Morton v. Mancari* 417 U.S. 535 (1974).

⁴⁵ *United States v. Mazurie* 419 U.S. 544, 557 (1975).

⁴⁶ *Cherokee Nation v. Georgia* 30 U.S. 1(1831).

⁴⁷ Gover (2009) 17.

⁴⁸ Gover (2009) 17.

law and excluding Indians not taxed.) I do not dismiss the robustness of tribal autonomies, I only claim that the additional constitutional feature required for actual sovereignty is missing.

2.2.2.2. *The (embellished) concept of plural legal systems*

Another slightly embroidered concept within the purview of Indigenous law is that of plural or multiple legal systems. It encompasses both the recognition and respect for Indigenous law along the framework of tribal autonomy as well as the incorporation of certain, mostly procedural legal institutions in the “majority” legal system in cases and procedures involving Indigenous peoples (in issues coming under the scope of Indigenous claims and interests).

As Kirsty Gover explains, “recognition” is an ambiguous term, and there are at least three different meanings to it: “In the first, the term ‘recognition’ is used to describe a situation where there is official acknowledgment that a body of norms is law, albeit law that will not be applied in institutions of the state. This may occur for instance in the ‘recognition’ of foreign law or international law, and also describes the situation where the existence of Indigenous ‘traditional laws’ is acknowledged by courts, but these laws do not otherwise qualify for common law recognition. [...] [In another] sense, the term recognition is used to denote the state’s incorporation of norms into its own legal system as formal legal rules or rights. This occurs in the common law recognition of aboriginal title rights [...] Finally, recognition can refer to official deference to a distinct legal system that produces and implements its own law. Tribal selfgovernance arrangements give effect to recognition in this latter sense.”⁴⁹

While these “concessions” to Indigenous traditions are remarkable, in my opinion, classifying the entirety of the legal system to be “plural” because of the inclusion of such measures is, again, a metaphorical or symbolic speech act. While the development is unique and substantive, it is actually incorporated both procedurally and substantively by the (settler) state legal system, which thereby became more diversified, but not multiplied.

2.2.2.3. *Symbolic constitutional and political speech acts*

A connected, Indigenous-specific, and again, symbolic, process, pertains to public statements, which are not legal in nature, but are connected to public institutions, be they state-related functions or educational events. The so called “land acknowledgments” are formal statements displayed or made in a plethora of public events and sites, acknowledging the original Indigenous

⁴⁹ Gover (2009) 5. Also see Webber (2006) 167–198.

Peoples of the land, spoken at the beginning of public activities (in schools, museums, churches, local or national government functions, cultural events, etc.). It is both an acknowledgment of the historical and traditional presence of aboriginal people, and is also a speech act of recognition, as similar acknowledgements are habitual elements of many traditional Indigenous cultures. In Australia “Welcome to [...] Country” is a ritual or formal ceremony that is performed by a recognized elder or traditional owner/custodian, or, if unavailable, an “Acknowledgement of Country” is performed. In New Zealand, Māori words are also commonly used in greetings of public speakers. Land acknowledgement signals a healing, restorative, and reconciliatory process that engages in social and institutional transformation.⁵⁰

2.2.2.4. *Land rights*

As noted, land rights constitute the core of tribal autonomy, rooted in the special relationship Indigenous people have with the environment. The way land rights or titles are recognized differs from country to country, even within related jurisdictions, such as former British colonies. Tribal self-governance is now embedded in the constitutional frameworks of the western settler states to resolve tribal land claims.⁵¹ It is a form of “internal” self-determination, in which tribes acquire a measure of autonomy but exercise it within the constitutional frame of the state. While tribes have always governed themselves, formal, written tribal self-governance is a recent phenomenon.

⁵⁰ See for example Smith (2023) 6. The Canadian – the Indigenous Advisory Committee, A guide to acknowledging First Peoples and traditional land: Land acknowledgements for staff and volunteers, 2021, <https://tinyurl.com/3t7svs6y> offers samples such as “I would like to begin by acknowledging the Indigenous Peoples of all the lands that we are on today. While we meet today on a virtual platform, I would like to take a moment to acknowledge the importance of the lands, which we each call home. We do this to reaffirm our commitment and responsibility in improving relationships between nations and to improving our own understanding of local Indigenous peoples and their cultures. From coast to coast, we acknowledge the ancestral and unceded territory of all the Inuit, Métis, and First Nations people that call this land home. Please join me in a moment of reflection to acknowledge the effect of residential schools and colonialism on Indigenous families and communities and to consider how we are and can each, in our own way, try to move forward in a spirit of reconciliation and collaboration.” As for email signatures, “The University of Alberta, its buildings, labs, and research stations are primarily located on the traditional territory of Cree, Blackfoot, Métis, Nakota Sioux, Iroquois, Dene, and Ojibway/Saulteaux/Anishinaabe nations; lands that are now known as part of Treaties 6, 7, and 8 and homeland of the Métis. The University of Alberta respects the sovereignty, lands, histories, languages, knowledge systems, and cultures of First Nations, Métis and Inuit nations.”

⁵¹ Gover (2009) 2.

In New Zealand, for example, the process was initiated as part of efforts to settle historic claims under the Treaty of Waitangi. It began in the mid-1970s with the establishment of the Waitangi Tribunal and the first settlement was concluded in 1992.⁵² In the United States, as noted, tribal self-governance has a longer history of recognition through treaties and other relationship with governments.⁵³ In Canada, the determination of common law aboriginal title was made by the Supreme Court in its aforementioned decision in 1973, and the first modern-era self-governance agreement was concluded in 1998.⁵⁴ In Australia, the mentioned landmark 1992 High Court decision made the first determination of native title, and opened the way for the beginning of the Native Title process.⁵⁵ Here, recognition occurs through the native title claims process, where communities are registered at the National Native Title tribunal by a federal court which is making a determination, after which the group is obliged to establish corporate structure (a Native Title Prescribed Body Corporate) to represent the title-holders and manage matters of internal governance.⁵⁶ A typical native title determination “would specify the right of native title holders to live on the land, or to be present on it, in order to conduct at least several of the following activities: hunting, fishing and gathering, engaging in spiritual and cultural activities, conducting ceremonies, managing burial rites, maintaining and protecting sacred sites and water sources, taking materials for shelter, medicine, and weapons, regulating and controlling the use and enjoyment by others of the land and its resources, teaching law and custom, and inheriting and succeeding to native title rights and interests.”⁵⁷

While Indigenous peoples comprise around 14.5% of the population in New Zealand, 3.3% in Canada, 2.2% Australia and 1.5% in the United States,⁵⁸ as Gover points out, “Tribal self-governance takes place against a complex demographic backdrop [...] Not all Indigenous persons affiliate to tribes. [...] the proportion of persons formally enrolled in self-governing tribes is substantially less than the number of persons self-identifying as Indigenous. [...] In North America, the proportion of self-identifying Indigenous persons not enrolled in a tribe is fifty-three percent in Canada and forty-three percent in the United States. Fifty-four percent of Indigenous Australians did not

⁵² Gover (2009) 14.

⁵³ Gover (2009) 14.

⁵⁴ Gover (2009) 14.

⁵⁵ Gover (2009) 14.

⁵⁶ Gover (2009) 13.

⁵⁷ Gover (2009) 15.

⁵⁸ Gover (2009) 3.

affiliate with a tribal grouping, nor did twenty percent of Maori. Likewise a high proportion of Indigenous persons, including those who do affiliate to tribes, nonetheless do not live in tribal territory. [...] In the United States and Canada respectively, sixty-one and sixty-nine percent of Indians lived away from tribal lands. In Australia and New Zealand, the proportion of Indigenous persons living away from their tribal territories is estimated at seventy-eight and eighty-three percent respectively.”⁵⁹

As Gover continues, “recognized tribes have a territorial base, but the extent to which their jurisdiction is coincidental with that territory, and the exclusivity of that jurisdiction, varies considerably between countries. As a general principle, unlike public governments, the jurisdiction of tribal governments is membership-based. It is confined to those persons who can be said to have consented to tribal authority by virtue of their membership, or have otherwise agreed to tribal jurisdiction through contract, agreement, or as a condition of residence. North American tribes are strongly territorial, governing bounded reserved lands (‘reserves’ in Canada, and ‘reservations’ in the United States). With some exceptions, North American tribal governments are able to control access to, and residence on, the tribal territory. This is not the case for Australian and New Zealand tribes, whose jurisdiction is defined by reference by the boundaries of their traditional territories but is narrowly confined to the inter-personal relations of members in relation to the use of tribal property.”⁶⁰

A number of questions pertain to the content of tribal autonomy, for example in regard to activities that are not intrinsically connected to or not executed in accordance with precolonial traditional lifestyles. Consider the noted issue of gambling facilities (serving and generating income from non-native Americans) in the US,⁶¹ or the 2021 decision of the Taiwanese Constitutional Court upholding laws ignoring Indigenous demands to create autonomous hunting regimes. In the latter case, a member of the Bunun Indigenous Nation hunted down two protected species (a Formosan serow and a Reeve’s muntjac) with a modern firearm instead of a handmade rifle, which would have been permitted, had he applied for a local government permission to hunt for cultural reasons. The District Court sentenced him to a steep fine and three and a half years imprisonment, rejecting claims that Indigenous peoples have been appropriating the most modern arms available

⁵⁹ Gover (2009) 6–7.

⁶⁰ Gover (2009) 14.

⁶¹ See for example Light – Rand (2005).

and incorporating them into their cultural practices since the first years of colonial contact, and as a means to protect their territorial sovereignty.⁶²

The most worrying issues pertaining to land rights concern the lack of respect by corporate agents. For example, the extractive industries target natural resources from tribal territories. As O'Brien et al. point out, "illegal deforestation, mining, and land clearances continue to desecrate sacred sites and oppress Indigenous peoples. [...] Land rights continue to be threatened by natural resource extraction, infrastructure projects, large-scale agricultural expansion, and conservation orders."⁶³ Connecting to discussions on sovereignty, as Beckman et al. note, in agreement with Postero:⁶⁴ "the central state still has jurisdiction over all nonrenewable natural resource decisions and channels funding to these entities subsumed to its power. Thus, the nation-state retained full sovereignty, despite language to the contrary."⁶⁵

2.2.2.5. *Special measures concerning the adoption of Native American children*

The preservation of indigenous communities is often supported by legislation restriction extra-tribal adoption. In the US, for example, robust special legal measures apply to the adoption of children with Native American descent. The issue involved a number of high-profile cases, including several Supreme Court decisions. In the 2023 *Haaland v. Brackeen*-case,⁶⁶ the Court rejected a challenge to the constitutionality of the Indian Child Welfare Act (ICWA), a 1978 federal law that, in response to the long and tragic history of separating Native American children from their families, seeks to keep Native American children with Native American families. This law established minimum standards for the removal of Native American children from their families, as well as a preference that Native American children who are removed from their families be placed with extended family members or in Native foster homes. The ICWA governs state court adoption and foster care proceedings involving Native American children, requiring placement of a child according to hierarchical preferences. Accordingly, Indian families or institutions from any tribe (not just the tribe to which the child has a tie) outrank unrelated non-Native American individuals and institutions, unless the child's tribe alters the prioritization order. Their preferences generally cannot trump those set by statute or tribal resolution, and a biological parent who voluntarily

⁶² Simon – Mona (2023) 192–193.

⁶³ O'Brien – Pan – Sheikh – Prideaux (2023) 172–176.

⁶⁴ Postero (2017) 184.

⁶⁵ Beckman – Gover – Mörkenstam (2022) 16.

⁶⁶ 599 U.S. ____ (2023).

gives up a child cannot necessarily choose the child's placement, as the tribe has a right to intervene and can enforce ICWA's placement preferences. The law gives tribal courts exclusive jurisdiction over child-custody proceedings involving Native American children who live or have their permanent residence on tribal land, and it also applies in child-custody proceedings in state court to the millions of Native American children who do not live on tribal land. Under the law, "Indian child" is defined broadly to include not only a child who is "a member of an Indian tribe," but also one who is "eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." For purposes of the placement preferences, an "Indian" is "any person who is a member of an Indian tribe," and an "Indian organization" is "any group [...] owned or controlled by Indians."

The Court, per Justice Barrett, explains that the law requires state courts to place an Indian child with an Indian caretaker, if one is available, even against the wishes of one or both biological parents, and even if the child is already living with a non-Indian family and the state court thinks it in the child's best interest to stay. The law was adopted out of concern that an alarmingly high percentage of Indian families are broken up by the (often unwarranted) removal of their children by nontribal public and private agencies to non-Indian foster and adoptive homes and institutions, and that this harmed not only Indian parents and children, but also Indian tribes. The Court concluded that the framework set forth by ICWA is constitutional and dismissed challenges.

2.2.2.6. The amendment of business culture and legal frameworks

A further Indigenous-specific set of legal measures pertains to obligations targeting business entities, whose operations may interfere with Indigenous land rights. In 2011, the United Nations Human Rights Council endorsed the Guiding Principles on Business and Human Rights, seeking to provide an authoritative global standard for preventing and addressing the risk of adverse human rights impact linked to business activity. These Principles formed the basis of the establishment of the Working Group on the issue of human rights and transnational corporations and other business enterprises (commonly known as the Working Group on Business and Human Rights). Indigenous peoples' organizations have developed their own sets of guiding principles related to the Guiding Principles on Business and Human Rights. The United Nations Global Compact, a principle-based framework for business focusing on human rights, labour, the environment and anti-corruption, published "A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples" in 2013, and the Working Group on Business

and Human Rights has produced two reports that address corporate activity and Indigenous peoples.⁶⁷

2.2.2.7. Special sensitivity for cultural appropriation

Finally, a special set of often non-legal norms pertain to respecting the special sensitivity of Indigenous people by monitoring and policing cultural appropriation, the use of traditional dress, music, cuisine, knowledge and other aspects of their culture, without their approval, by members of a different culture, and identifying cultural appropriation rooted in colonization and being a form of ongoing oppression and yet another form of extractivism of Indigenous communities.⁶⁸

There are also efforts to give legal meaning to the prohibition of cultural appropriation. In 1967, the United Nations established the World Intellectual Property Organization (WIPO), tasked with creating a global intellectual property system that would assist all countries in analyzing its intellectual property possibilities for economic, social, and cultural development. In 2001, in response to concerns raised by Indigenous groups about the protection of Indigenous art, clothing, and knowledge, the WIPO began working on negotiations to protect cultural symbols as intellectual property, among others, to address claims by Indigenous representatives to request a global ban on the unwarranted replication of Indigenous cultural expressions. Initiatives for most are in the stage of development, but there are national legislative incentives, such as the 1990 US Indian Arts and Crafts Act (giving recognition to the rights of Native American tribes and artists regarding their products and creations).⁶⁹

Many countries also extend copyright protection to “moral rights,” in particular the rights of attribution and integrity of a work. For example, Ghana, Nigeria, Cameroon, Lesotho, Mali, Senegal and Uganda include “folklore” as a, possibly intangible, form of copyright that derives from particular communities, even if the author is unidentified. In other countries, special laws grant a *sui generis* protection for “traditional knowledge,” “traditional cultural expressions” or “Indigenous knowledge,” such as in Thailand, the Philippines, Guatemala, Panama, Costa Rica, Venezuela, Peru and South Africa.⁷⁰ The UN Declaration on the Rights of Indigenous Peoples also contains provisions on the protection of cultural traditions and traditional

⁶⁷ United Nations (2019) 24–25.

⁶⁸ See for example Kennedy – Makkar (2020) 155–168.

⁶⁹ See for example Gonzalez (2019).

⁷⁰ Siems (2019) 411.

knowledge, and UNESCO deals with expressions of folklore, traditional culture and intangible cultural heritage.⁷¹

Trademark protection may address some of the possible cases of cultural appropriation. For example, in the US, “source communities” are able to register phrases, symbols, designs, artwork, certain music, and characters in oral tradition. The Navajo tribe, for example, holds eighty-six registered trademarks under its name.⁷² But practice varies: in the US, a court cancelled the Washington Redskins trademark as disparaging to Native Americans; in South Africa, a court rejected the application by a German company for a patent that was intended to make use of Indigenous bio-resources; and in New Zealand, the law explicitly forbids registration of trademarks that contain, or are derived from, a Māori sign including text or imagery, assigning this chapter to a Māori Trade Marks Advisory Committee.⁷³ As Siems points out, there are laws that protect consumers against unfair commercial practices that may apply to cases where someone deceives the public about their true identity, for example, if a person selling artwork represents it as Indigenous artwork when it is not. “However, [...] cases are unlikely to be unlawful under any law, such as ‘merely’ running a Indian restaurant (while not being Indian) or writing a book under a pseudonym (and therefore possibly associating with another group identity.)”⁷⁴

2.2.3. Non-Indigenous-specific legal and policy measures

In addition to legal (and related) institutions and regimes that are unique and specific to Indigenous people discussed in the previous sections, there are additional ones, applied to other communities of difference.

First, similarly to (other) “minorities,” affirmative action, preferential treatment can be applied to Indigenous people in the field of education or employment, and we see a widespread international practice of this.⁷⁵

Second, although land rights and the construction of Indigenous titles are unique to Indigenous peoples, they can be considered to be a form of territorial autonomy, again, a habitually used constitutional design.

⁷¹ Siems (2019) 411.

⁷² Siems (2019) 412.

⁷³ Siems (2019) 412.

⁷⁴ Siems (2019) 412.

⁷⁵ See for example Gisselquist – Schotte – Kim (2023); Daly – Gebremedhin – Sayem (2013); Higham – Shah (2013).

Third, there are also novel initiatives for cultural autonomy. For example, De Villiers⁷⁶ explains the recent regime introduced in Western Australia, where an agreement was concluded to go beyond established models for recognizing the traditional ownership of the land of the Noongar people, by non-territorial self-governing corporations. “The corporations are not public law institutions, but in effect the powers and functions they discharge are of such a nature that they form in effect a fourth level of government.”⁷⁷ They can exercise powers and functions not only in regard to aspects arising from traditional law and customs, but also in socio-economic fields such as housing, welfare, land management, conservation and tourism. Only Aboriginal people may register this type of corporation which has to meet the requirements of the Aboriginal Communities Act: the community has a constitution under which it operates; there is a proper consultative mechanism to ascertain the views of community members; and there is a desire of the community to be responsible for local self-government. Once established, the community may make by-laws similar to those of a local government in regard to the matters that fall within its competence and, hence, has a “government” status, and not merely a private association that organizes its own cultural affairs.

Fourth, there are various and widely applied affirmative measures in political representation.⁷⁸ Solutions are multifaceted. The failed “Voice referendum” for a constitutional amendment in Australia to introduce consultative mechanism in 2023 is discussed widely,⁷⁹ similarly to the New Zealander electoral regime, which, since 1975 allows voters to choose whether to vote for separate Māori electorate seats in Parliament or to the general electorate.⁸⁰ There are currently seven reserved seats for Māori representatives in the national parliament, a figure which is adjusted every five years to be proportionate to the number of voters registered on the Māori electoral roll.⁸¹ Similar regimes operate in Lebanon, Fiji, Zimbabwe, Singapore, the United States dependencies of Guam and Puerto Rico, and India, while the Sámi (Scandinavian Lapps) have a separate parliament.⁸² Proportional representation, however, may not be a sufficient solution, even with reserved seats, if Indigenous peoples are outnumbered by settlers 35 to 1, as in Australia; 24 to 1, as in Canada; 67 to 1, as in the US; or 450 to 1, as with the Sámi in Sweden. Here

⁷⁶ De Villiers (2019).

⁷⁷ De Villiers (2019).

⁷⁸ See for example Barié (2022); Williams – Schertzer (2019).

⁷⁹ See for example Hobbs (2023).

⁸⁰ See for example Vowles – Gibbons (2023).

⁸¹ Beckman – Gover – Mörkenstam (2022) 7.

⁸² See for example Parliamentary Library Research Paper New Zealand, The Origins of the Māori Seats, November 2003, <https://tinyurl.com/3rdctdre>

novel consultative processes between institutions representing Indigenous peoples and Governments seem like a good addition.⁸³

Fifth, there are novel formations of truth and reconciliation (TRC) committees applied in the Indigenous context. As Maddison et al. explain, “truth commissions are temporary, state-sanctioned inquiries that typically last from one to five years, and are intended to investigate particular events and examine a specific series of violations over a defined period of time. Often led by high-profile figures with a respected human rights record, their work usually involves collecting testimony from victims and (sometimes) perpetrators, through a team of investigators and other support staff. Conceptually, truth commissions tend to be complex, political, and moral enterprises that ‘both invoke and recast history and law.’ Beginning in the 1980s, truth commissions have emerged as a popular method of dealing with the past in deeply divided societies.”⁸⁴ For example, in 2022, as Maddison et al. continue, the state of Victoria established the Yoorrook Truth and Justice Commission, marking a new era in Australian truth-telling focused on the history of invasion and colonization of First Nations’, mandated to make recommendations for healing, system reform, and practical changes to laws, policy, and education, as well as to matters to be included in future treaties. The demand for truth-telling in Australia re-emerged in 2017 as a component of the Uluru Statement from the Heart, a collective call from a broadly representative group of Aboriginal and Torres Strait Islander people,⁸⁵ the same initiate that led to the Voice-referendum and constitutional amendment project.

Sixth, although a separate discussion will follow on the relationship between the analytical and practical categories of race and indigeneity, it needs to be mentioned here that protections against racial discrimination or racially motivated victimization also apply to Indigenous people.

Finally, *seventh*, various elements of Indigenous culture and tradition can also be protected under the auspices of religious freedom.⁸⁶ Freedom of religion is enshrined within the United Nations Declaration on the Rights of Indigenous Peoples. Article 12 states: “Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human

⁸³ Beckman – Gover – Mörkenstam (2022) 8.

⁸⁴ Maddison – Hurst – Thomas (2023) 214. For more see for example Wiebelhaus-Brahm (2009); Kochanski (2020); Paulson – Bellino (2017).

⁸⁵ Maddison – Hurst – Thomas (2023) 2.

⁸⁶ See for example Mikhailovich – Pavli (2011); Shrubsole (2019); Sikka (2024); Mutua (1999).

remains. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with Indigenous peoples concerned.” Thus, Indigenous religion, traditions and culture are intertwined with land rights and access.

Certain social, political and legal debates center around access to secret sites, special rules for excluding women from certain ceremonies, to be discussed subsequently, retrieving objects or human remains to the possession of Indigenous people, as well as cultural and intellectual property rights in connection with religious expression.⁸⁷ A particular, widely discussed and litigated issue concerns religious exemptions for consuming illegal drugs for ceremonial purposes.⁸⁸

2.3. Limitations of accommodating Indigenous autonomy

In order to understand the substance and content of Indigenous rights, especially the legal fiction of Indigenous sovereignty, a separate discussion of the inherent limitations of legal conceptualization is in place. Three distinct limitations need to be noted.

The *first* pertains to the classic dilemma of multiculturalism and the tolerance for illiberal minority practices, including harmful traditional practices,⁸⁹ in particular, the principle of gender equality.⁹⁰ A Classic example is the 1985 UN Human Rights Committee *Lovelace*-case,⁹¹ where Sandra Lovelace a Maliseet Indian, under the Indian Act, referring to tribal regulations, after marrying a non-Indigenous man, lost her official status as an Indian and the attendant benefits, including the right to live on the reserve. The HRC held that Canadian law violated Article 27 of the International Covenant on Civil and Political Rights.⁹² Recent international and national legislation on Indigenous rights explicitly includes limitations (or modifications) on Indigenous self-determination, requiring it to be in conformity with gender equality. For example, Article 44 of the UN Declaration on the Rights of Indigenous Peoples sets forth that “All the rights and freedoms recognized herein

⁸⁷ See for example Ramstedt (2020).

⁸⁸ See for example, Richardson – Bellanger (2016); De Vos (2001); Maroukis (2012). See the chapters by Zsolt Körtvélyesi, and Noémi Nagy – Norbert Tóth in this volume.

⁸⁹ On this, see for example Winter – Thompson – Jeffreys (2002).

⁹⁰ See for example Kymlicka (1995); Moller (1999); Kymlicka (1999).

⁹¹ Supp. (No. 40) at 166, UN Doc. A/36/40 (1981).

⁹² See chapter by Noémi Nagy – Norbert Tóth in this volume.

are equally guaranteed to male and female Indigenous individuals.” Likewise, the American Declaration on the Rights of Indigenous Peoples states in Article VII that “1. Indigenous women have the right to the recognition, protection, and enjoyment of all human rights and fundamental freedoms provided for in international law, free of all forms of discrimination.” As an example for national legislation, Section 35 of the 1982 Canadian Constitution Act states that “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed. [...] Notwithstanding any other provisions in the Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.”

A *second* type of limitation pertains to protective measures that can be characterized as instruments of legal paternalism, necessitated by public security or public health measures that affect Indigenous people, often even on tribal lands. One highly debated, but widely used example concerns ban on selling alcohol (for example liquor restrictions in Aboriginal town camps and beyond, in Australia).⁹³

A *third* type of limitation to Indigenous self-determination is, somewhat ironically, rooted in environmentalism, restricting hunting and fishing in certain areas where the very essence of Indigenous rights and claims concern exemptions from these measures. Environmental justice and Indigenous justice and activism mostly go hand in hand, but natural conservatism, especially if backed by corporate interests is used to curtail Indigenous rights. Williams, for example, reports on how the Tanzanian government prohibited all (including Indigenous) human settlement inside and near the Ngorongoro Conservation Area, where over 600,000 tourists travel to each year to catch a glimpse of the Great Migration, the famed trek of more than one million wildebeests and thousands of zebras, gazelles and other animals crossing over the Mara River into Kenya and back. Plans are to raise the number of visitors to five million, generating 6 billion USD annually. In the name of conserving the land and protecting biodiversity, the project requires 100,000 people to relocate, mostly Maasai pastoralists who have used Ngorongoro’s vast grasslands to sustain their seminomadic cattle-herding way of life for generations. The pattern is similar in India, where the creation of tiger reserves to attract foreign tourists resulted in violent clashes and the evictions of scores of Adivasi Indigenous peoples from their ancestral lands. Another example is the Democratic Republic of Congo, where the Batwa Indigenous peoples (formerly referred to by the derisive, racist term “pygmies”) continue

⁹³ See for example Clifford – Smith – Livingston – Wright – Griffiths – Miller (2021); Hudson (2011).

to resist government efforts to block them from returning to the Kahuzi-Biega National Park after being evicted in the 1970s.⁹⁴

To add a final note here, even if certain activities are conducted under the auspices of territorially autonomous Indigenous land rights, (settler) state jurisdiction in many cases (for example in criminal law, depending on where an incident occurs, whether the defendant or victim is an Indigenous, the type of crime alleged, treaty provisions, etc.)⁹⁵ often still applies, or state legislation is applicable in a hybrid manner, coexisting with Indigenous law. For example, in the US, the legal framework for the mentioned Indian gambling depends on the type of activity, with “class I gaming,” meaning traditional and social games with minimal prizes being regulated exclusively by tribes; “class II: Bingo and similar games” being only operated by tribes if the state permits such games; and “class III: Casino-style gaming,” e.g., slot machines and blackjack requiring a tribal-state compact between the tribe and the state government.⁹⁶

3. Operationalizing indigeneity

The Indigenous law framework is unique in its strict, blood-quantum based, objective requirements set forth by the Indigenous communities itself. These requirements contribute to a basic tenet of Indigenous self-determination, in addition to which, in this section we explore other means of operationalization as well. The community-based definition of who is Indigenous is also unique in the sense that establishing and monitoring these objective criteria are carried out by the community (and not external agents). This makes the application of the five-fold classification somewhat inadequate in this case. Examples used in this section are mostly from the former British colonies, and here is another special feature of defining indigeneity, namely, that there are competing and overlapping concepts of aboriginal, First Nation, or Native American indigeneity, with different operationalizing schemes. Even though the principle is to rely on community membership self-governance, tribal membership will often be slightly different from indigeneity as recognized

⁹⁴ Williams (2024). For more, see for example Erickson (2020): 111–128. Also consider, for example, the 2017 *Ogiek*-case of the African Court on Human and Peoples’ Rights (*African Commission on Human and Peoples’ Rights v. Republic of Kenya*, ACtHPR, Application No. 006/2012 (2017)), which found the expulsion of the Ogiek people, a Kenyan hunter-gatherer community, from their ancestral lands in the Mau forest a violation of the African Charter on Human and Peoples’ Rights.

⁹⁵ See for example Leonhard (2021) 45.

⁹⁶ See for example González (2022); Conner – Franklin (2019).

by the state, partly because the latter encompasses all native descent, whereas tribes will have rules specific to the community, often excluding, for example, multiple membership. Generally, there are three elements that come into play: self-identification, community acceptance, and descent.⁹⁷

Let us first revisit international standards: Article 9 of the UNDRIP states that “Indigenous peoples and individuals have the right to belong to an Indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned.” Under Article 33 “1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.” The American Declaration on the Rights of Indigenous Peoples states in Article I. 2. that “Self-identification as Indigenous peoples will be a fundamental criterion for determining to whom this Declaration applies. States shall respect the right to such self-identification as Indigenous, whether individually or collectively, in keeping with the practices and institutions of each Indigenous people.” Furthermore, Article VIII. states that “Indigenous persons and communities have the right to belong to one or more Indigenous peoples, in accordance with the identity, traditions, customs, and systems of belonging of each people.”

In the above-mentioned landmark *Mabo (no. 2) v. Queensland*-decision, the Australian high court summarized its approach as follows: membership of the Indigenous people depends on biological descent from the Indigenous people and on mutual recognition of a particular person’s membership by that person and by the elders or other persons enjoying traditional authority among those people.⁹⁸ In the 1995 *Desmond Gibbs v. Lyle Capewell*-case⁹⁹ the Court provided greater clarity to the relevance of a person’s descent: “in order for someone to be described as an ‘Aboriginal person’ [...] some degree of Aboriginal descent is essential, although by itself a small degree of such descent is not sufficient. [...] The less the degree of Aboriginal descent, the more important cultural circumstances become in determining whether a person is ‘Aboriginal’. A person with a small degree of descent who genuinely identifies as an Aboriginal and who has Aboriginal communal recognition as such would [...] be described in current ordinary usage as an ‘Aboriginal person’ and would be so regarded for the purposes of the Act.” Citing case law, de Villiers adds, that “as far as community acceptance is concerned account must be taken that a community is a social and dynamic construct without a legal persona to make decisions[...] but [...] such a decision cannot

⁹⁷ De Villiers (2021) 63.

⁹⁸ De Villiers (2021) 64.

⁹⁹ *Desmond Gibbs v. Lyle Capewell*, Australian Electoral Commission and Minister of Aboriginal and Islander Affairs [1995] fca 1048; (1995) 128 alr 577 (1995) 54 fcr 503 (3 February 1995).

be made arbitrarily [...] [and even] the subjective assertion of membership may be adequate for a community to accept a person. [...] ultimately the Court decides who comprises the native title group.”¹⁰⁰

An important feature of the Indigenous framework is that despite the fact that consequences of such a classification are far-reaching (such as eligibility for several forms of affirmative action and preferences of tribal lands/reservations, eligibility to take part in the election for /reserved political institutions, and a diverse set of immunities and privileges connected to tribal membership), and notwithstanding the unique practice of defining membership through rigid descent and blood quantum based mechanisms (allotted to the communities), the classification scheme is rarely consistent or even transparent. Not only does international and (for most,) domestic legislation openly decline to define what indigeneity is, who the Indigenous groups are, but for most, the framework for membership is also opaque. Gover points out that even though “tribal membership increasingly determines federal Indianness (federal agencies increasingly require tribal membership in eligibility criteria for Indian programs), and [even though] federal Indianness is the cornerstone of the entire field of federal Indian law, surprisingly little is known about how tribes select their members and why they choose some criteria over others.”¹⁰¹ For example, in the US, tribes are usually not required to prepare written constitutions or to commercially publish or circulate them. Consequently, scholarly observations about tribal membership practices have been expressed only in highly abstract or tentative terms.

In sum, even while the federal government’s relationship with “Indians throughout the United States is now almost exclusively confined to members of federally recognized tribes, public decision-makers and theorists alike often have no clear idea of who is included in the tribal class or why.”¹⁰² Gover points to how settler governments are inconsistent concerning transparency: “On the one hand, most recognized tribes are required to prepare a written constitution, but on the other, most are not required to publish it. Settler governments do not require recognized tribes to submit enrollment lists, even when tribes are obliged [...] to report the size of their ‘service population’ for funding purposes. [...] Because so little is known about the mechanics of tribal membership governance, public decision makers and theorists alike usually have no clear idea of who is included in the tribal class and on what basis.”¹⁰³

¹⁰⁰ De Villiers (2021) 66.

¹⁰¹ Gover (2008) 244.

¹⁰² Gover (2008) 246–247.

¹⁰³ Gover (2010) 691–692.

In many jurisdictions, certainly in the former British colonies, there are two different standards for Indigenous classification: one for the (settler) state, and another for the tribes. The former applies to census and various preferential policies (also carried out by non-state actors, such as employers, educational institutions, etc.), the latter to tribal membership.

As Gover points out, while membership governance determines a person's access to tribal land, tribal resources, benefits of tribal services, the right to political and social participation in a tribal community, and increasingly, the right to benefit from public programs for Indigenous peoples, access to these is distributed unevenly amongst Indigenous peoples. "Some people who are regarded as legally Indigenous by settler governments are not tribal members, and some tribal members would not qualify as Indigenous under settler state laws."¹⁰⁴

The political dimension of how the two classificatory mechanisms interact is worth mentioning. As Gover points out, federal policy has a direct influence on tribal demographics: the more resources the tribe holds, the more membership applications it will receive.¹⁰⁵ And tribal membership is tied to the right to receive a personal or per capita share of tribal property. For example, tribal prohibition of multiple membership (in several tribes) is "also a way for a tribe to limit its social welfare responsibilities by excluding persons who are able to have their needs met elsewhere."¹⁰⁶

3.1. Self-identification

As noted, self-identification is as essential, necessary but not sufficient element in operationalizing indigeneity. The question is how much of the other elements is needed. For example, in New Zealand, as noted above, there are seats reserved in the national parliament for persons who identify as Māori. Māori means "person of the Maori race of New Zealand; and includes any descendant of such a person." Currently, under the Maori Purposes Act 1974, all persons of a Māori descent, regardless of the degree of decent, can choose every five years to have their names registered on the General or Māori electoral roll. (Prior to 1974 various attempts had been made to introduce some form of objective measure, such as proven descent, and persons with more than half Māori descent were not allowed to vote in a European electorate, and those with less than half Māori descent did not qualify to vote in a Māori

¹⁰⁴ Gover (2009) 3. Also see Gover (2011) 262–264.

¹⁰⁵ Gover (2008) 298–299.

¹⁰⁶ Gover (2010) 714.

electorate.) The decision to register on the Māori roll is entirely made by personal choice, no documentation is required and the assertion cannot be legally challenged unless the Registrar questions a registration.¹⁰⁷

The right to self-identify obviously extends to the right to not to identify as Indigenous, and self-identification is also the basis for official and community recognition, and non-tribal standards are satisfied with self-identification, but whether the tribe recognizes membership is entirely up to its rules and may be quite different from those applied by the state. Depending on the policies in question, sometimes official or external recognition also requires a (proof of) tribal recognition.

3.2. Community-based identification

As Gover explains, “While the jurisdictional arrangements agreed between settler governments and Indigenous communities vary substantially in their content and scope, all acknowledge the tribe’s right to determine its own membership.”¹⁰⁸ Official recognition exercises are mainly limited to requiring the applicant tribe to show that it is comprised of persons who are biologically descended from a known ancestral community.¹⁰⁹

As Gover continues, “The vast majority of United States tribes define descent by reference to a base-roll. Tribes use five basic rule-types to construct membership regimes: lineal descent, parental enrollment, Indian blood quantum, tribal blood quantum, and parental residency. Parental enrollment is the most frequently occurring descent rule, used by just over half of tribes. The remaining tribes use lineal descent, variously referring to ‘direct descendants,’ ‘lineal descendants,’ ‘lineal descendants by blood,’ ‘issue by blood,’ ‘biological lineal descent,’ ‘blood line descendant,’ and persons with ‘blood ties through ancestry’¹¹⁰ [...] The Canadian government takes a different approach to tribal membership, as does the New Zealand government. Both refrain from interference in the prospective membership practices of tribes, but control the composition of a newly recognized tribe’s first roll—the base-roll.”¹¹¹ The standards, thus, vary greatly.

The most prominent feature of tribal self-determination is tribes’ ability to define membership criteria by deploying means of precision to ascertain

¹⁰⁷ De Villiers (2021) 73.

¹⁰⁸ Gover (2009) 18.

¹⁰⁹ Gover (2009) 18.

¹¹⁰ Gover (2009) 20.

¹¹¹ Gover (2009) 22.

descent that is unparalleled for other groups (such as national minorities). An important feature of the blood-quantum requirements, that most notably characterizes the former British colonies, is, as Gover points out, to a significant degree inspired by settler policies and not an “Indigenous” feature of identification or classification for Indigenous communities. The American concept of blood quantum, for example “originates with the federal government and has been used historically to identify Indians as members of a pan-tribal racial class,”¹¹² and tribes have relied on it because it was “a well-documented administrative device that conveniently concurs with federal expectations of tribal continuity and political cohesiveness.”¹¹³ In a way it is ironic how the Western, settler concept of blood-quantum, used initially in the US to stop the “dilution” of enslavable Black “bloodline” (and also to demarcate the boundaries of Whiteness) had been implanted to the tribal conceptualization of membership, which then again makes a return to settler classifications, as nowadays “tribal membership increasingly determines federal Indianness (federal agencies increasingly require tribal membership in eligibility criteria for Indian programs).”¹¹⁴

Overall, as Gover explains, parental enrollment rules are only used by North American tribes, while lineal descent rules are dominant in Australia. “Parental enrollment rules are intended to identify eligible children, not to show the connection of prospective members to historical ancestors in order to establish the continuity of the community. [...] In Australia and New Zealand, because tribal constitutionalism emerges from the settlement of land claims, a major function of descent rules is to demonstrate that the community is the proper successor of a historical group, entitled to inherit its property and status. [...] In North America, by contrast, the official quantification of ancestry is designed to allow some descendants to be excluded from the category of persons who are legally Indigenous.”¹¹⁵ The hemispheric difference, as Gover points out, thus, roots in the fact that in the US, the government’s administrative apparatus of blood quantum preexisted, it was familiar, and easily adaptable for tribes to their membership regimes.

Another important question pertains to the membership status of legally adopted children. As Gover explains, “standard human rights principles prevent public governments from making distinctions between adopted and biological children. Most tribes, however, enact membership laws that give

¹¹² Gover (2008) 298–299.

¹¹³ Gover (2008) 298–299.

¹¹⁴ Gover (2008) 244.

¹¹⁵ Gover (2010) 698–700.

preference to persons who are biological descendants of tribal ancestors¹¹⁶ [...] Put in very broad terms, settler states tend to view descent as a matter of legal status, not biology, while tribes tend to insist that for tribal purposes legal descent can only be conferred on persons with blood-ties to tribal ancestors.”¹¹⁷

It is a consequence of tribal self-determination that the community can also accept non-descendants. They, however, must show that they are closely connected to the tribal community. Examples of such a connection can be “indigeneity (descent from another Indigenous community), cultural competency, capacity to contribute to the welfare of the tribe, long residency, marriage to a tribal member, and [...] legal adoption by a tribal member.”¹¹⁸

A final element in membership self-governance concerns terminating tribal membership. A part of the negative dimension of free choice to identify as Indigenous, is for individuals to have the right to leave the tribe, relinquish tribal membership, with or without ceasing to identify as Indigenous for other, non-tribal purposes. Gover carried out an analysis of the tribal practice, finding that “Close to 40 percent of the tribes [...] specify that individuals may unilaterally relinquish their membership in the group. [...] The grounds for (involuntary) disenrollment generally fall into three categories: fraud or error, dual enrollment, and prohibited conduct. [...] Canadian tribes [...] allow the disenrollment or ‘banishment’ of persons for misconduct, for example, where a member has a ‘lifestyle that would cause his or her continued membership in the First Nation to be seriously harmful to the future welfare and advancement of the [First Nation],’ or has been a ‘consistent disruptive force in the community’. A few specify broader types of ‘misconduct,’ allowing the expulsion of a person ‘who does not have a significant commitment to the history, customs, traditions, culture and communal life of the Band.’”

¹¹⁹ Some Maori constitutions allow the expulsion of a member who is “acting in contravention with the rules, with the objects and purposes of the society, or in a way that is ‘detrimental or prejudicial to the Society’.”¹²⁰ In Australia, legislation includes compulsory rules requiring the cancellation of a person’s membership if the individual cannot be contacted for two years, or “has behaved in a way that significantly interfered with the operation of the corporation or its meetings.”¹²¹

¹¹⁶ Gover (2009) 18.

¹¹⁷ Gover (2009) 19.

¹¹⁸ Gover (2009) 20.

¹¹⁹ Gover (2010) 715–716.

¹²⁰ Gover (2010) 717.

¹²¹ Gover (2010) 717.

3.3. Objective criteria-based identification

As seen above, community-based classifications are closely intertwined with “objective” criteria of descent. As for other avenues of “objective” classificatory mechanisms, De Villiers notes that in Finland, where in order to register as a voter for the Sámi parliament a person must prove they are Sámi, the test is not simple: a person must consider themselves as Sámi and give evidence that they speak the Sámi language, or prove that their parents or grandparents speak or have spoken Sámi at home, or that a parent is or has been on the Sámi electoral register. The language requirement, however, is not straightforward: for example, the language on the birth certificate of a mother is accepted as proof.¹²²

Sometimes, in curious intersections of group conceptualization and membership operationalization, the ontology of the objective criteria comes into question. For example, the

the New Brunswick Court of Appeal held that a Miꞵmaq man living in the traditional Miꞵmaq hunting territory of St. John, New Brunswick could not exercise his Aboriginal rights to hunt because he could not prove he descended from a group that was present at the time of contact with Europeans.¹²³ The court based its decision on a historian’s expert testimony contending that the Miꞵmaq had no central government or a “Super Chief,” and therefore they were not a nation.

Sometimes other “objective” elements are sources of contradiction. In 2022 the Taiwanese Constitutional Court invalidated a(n Indigenous-backed) legal provision that required people to take up Indigenous family names in order to qualify as Indigenous. Following the decision, children with Indigenous mothers who have Chinese surnames passed on from their fathers can now assume Indigenous identities. Although the Court intended the ruling to be an expansion of the protection of Indigenous culture and peoples, the decision triggered opposition from Indigenous activists, who interpreted it as a weakening of Indigenous identity and a new form of assimilation.¹²⁴

To conclude this section, as noted, the typology of the five classificatory mechanisms is not entirely helpful: self-identification is one way of operationalizing indigeneity, in a coexistent fashion with community-based frameworks, which mostly include objective factors (influenced by historical settler administrative givens and, again, settlers’ conceptualizing narratives for indigeneity). Interestingly, while Indigenous ancestry is a notable feature in

¹²² De Villiers (2021) 68–69.

¹²³ Metallic (2020) 230.

¹²⁴ Simon – Mona (2023) 187–197.

commercial DNA-heritage services, its use has not been particularly relevant in policy narratives.¹²⁵ Likewise, given the extensive detail of community-classifications and its interconnected nature with state definitions, “identification by proxies” also appears to be irrelevant in the Indigenous legal discourse. As for external perception, besides the standard for reliance of this in hate crime and discrimination cases, no relevant Indigenous-related policies are built on it.

4. Contesting indigeneity

There are several, previously mentioned ways in which indigeneity can be or is contested. The *first* concerns groupness, that is whether a given community can be recognized as Indigenous. In those regimes where meticulous requirements are set forth to demonstrate the continuous presence of Indigenous traditions or a direct ancestral descent, given the noted duality of classifications, even if a tribal recognition is rejected, individuals can still claim pan-tribal, descent-based recognition. A distinct, complex set of legal dispute concern the status of the Freedmen, former slaves owned by Indians, who then claimed tribal recognition.¹²⁶

The *second* type of contestation concerns cases when individuals and tribes contest tribal membership. Refusal of tribal enrollment, again, does not necessarily exclude Indigenous recognition by external agents (such as state or other preferential treatment programs in, say education or employment). A special historical case concerns Blacks or mix-race litigants in the US, who could claim to qualify as Native American, and hence potentially avoid enslavement.¹²⁷

The *third* type of contestation is mostly outside the terrain of law and pertains to the self-identification of individuals as Indigenous in the context of preferential treatment programs ran by the state or other (for example educational or employment) agents, or even in more subtle dimensions of social activities. The most notable recent “scandal” probably concerns US senator Elizabeth Warren, who was accused of “falsely” identifying as Native American for benefits in her education and employment career.¹²⁸ As part of the political mud-throwing, she published results of a DNA-test claiming it

¹²⁵ See for example Matt – Kowal (2019); Leroux (2018); Tallbear (2008).

¹²⁶ See for example Farmer-Kaiser (2010).

¹²⁷ See for example *Hudgins v. Wright*, 11 Va. (1 Hen. & M.) 134 (Sup. Ct. App. 1806). Also see Haney-López (1994).

¹²⁸ See for example Rich (2012); Wood (2018).

as evidence for her membership in the Cherokee nation,¹²⁹ representatives of which had fiercely rejected such avenues to assert membership.¹³⁰

In Canada, the case of Buffy Sainte-Marie, an iconic, Oscar-winning Canadian Indigenous musician who received fame as an Indigenous artist is particularly noteworthy, when her ancestry was called into question by family members and an investigation that included genealogical documentation, historical research and personal accounts. Her website describes her as a “Cree singer-songwriter” who is “believed to have been born” on the Piapot First Nation reserve in Saskatchewan and taken from her biological parents when she was an infant and raised by a white family in the US. (According to media reports, her birth certificate shows that she was born in Stoneham, Massachusetts, and there were no indications of Indigenous ancestry.)¹³¹

In the field of academia, the case of Andrea Smith, a prominent ethnic studies professor at the University of California, Riverside triggered attention. She left her professorship after years of accusations from colleagues, that she falsely claimed to be Native American—and her scholarship was partly built on her claimed Cherokee identity.¹³² (A similar case concerned Brown and Berkeley professor Elizabeth Hoover.)¹³³

The above cases illustrate that contestation can be made by individuals (colleagues, other “stakeholders”), the state, or even the communities/tribes. The cases rarely make it to the legal terrain, and involve only informal, social sanctioning, partly due to the dominance of self-identification regimes, but also because the “undeserved” benefits do not only include one-time formal preferential treatment, but more opaque, yet long-lasting or continuous benefits in marketable identity profiles.

Sometimes, nevertheless, we see litigation or even prosecution. For example, in 2023, the Nunavut Royal Canadian Mounted Police charged three women, a mother and her twin daughters, with fraud for claiming Inuit status to obtain scholarship funds meant for Inuit groups. Having misled tribal authorities, the Qikiqtani Inuit Association and Nunavut Tunngavik Inc., running the Inuit enrolment process, they received enrolment cards and as a result of their beneficiary status land claim, the sisters were able to access \$160,000 for education-related expenses.¹³⁴

¹²⁹ Warren (2018).

¹³⁰ Khalid (2019).

¹³¹ See for example Cecco (2023).

¹³² See for example Patel (2023).

¹³³ Kang (2024).

¹³⁴ Taylor (2024).

5. Concluding remarks

As explained, this analysis had no ambition to present the complexity of Indigenous legal regimes; the case studies admittedly showed geographic bias, and were only chosen to demonstrate the notable features of the Indigenous framework, which consist of the unique constitutional fiction of tribal sovereignty, legal pluralism, and the novel designs of (ownership and access to) land rights, and tribal membership governance. The writing showed the unique models of (settler) states recognizing “biologized” operationalizing classifications for tribal descent. The Indigenous case also presents unparalleled symbolic inclusion in public discourses and public speech acts, also transposed to intellectual property initiatives to protect Indigenous culture and prevent cultural appropriation.

The analysis highlighted how the conceptualization of Indigenous rights is rooted in the moral and political expression of the wrongfulness of colonization, as well as a commitment to provide symbolic, financial, and territorial compensation for the grievances and to recreate a spatial and a legal framework for the descendants of the oppressed to continue or reimagine practicing some crucial elements of their traditional lifestyles. I emphasized that unlike in the case of national minorities, here no direct power-sharing political pressures or an underlying concern for national or international security exists. This gives special importance to the uniqueness of the Indigenous framework, which is one of the few examples of exemptions from the individual human rights-based post-1945 global narrative and master ideology, which was actually invented to be a replacement for collective rights for self-determination.

The analysis also showed that while the Indigenous law framework is unique in setting forth strict, blood-quantum based, objective requirements by the Indigenous communities, tribal membership will often be slightly different from indigeneity as recognized by the state, partly because the latter mostly encompasses all native descent. Thus, while generally there are three elements that come into play when classifying Indigenousness—self-identification, community acceptance and descent—often there are two different standards for Indigenous classification: one for the tribes, and another one for the (settler) state and other non-tribal non-state actors, such as employers, educational institutions, etc. Some, who are regarded as legally Indigenous by settler governments are not tribal members, and some tribal members would not qualify as Indigenous under settler state laws. Also, only a segment of individuals who self-identify as Indigenous will be tribal citizens.

Connecting to the generally arbitrary and politically rooted nature of conceptualization and operationalization, the analysis emphasized that settler government policies will have a direct influence on tribal demographics (since tribal membership is tied to the right to receive a personal or per capita share of tribal property and social welfare responsibilities).

The analysis also stressed that the type and methodology tribes use (in theory reflecting their traditional cultural practices) is in fact highly shaped and influenced by the historical givens of settler administrative practices, such as censuses and other official classification schemes, and, more importantly, the settler constitutional philosophy for Indigenous recognition.

It was explained that self-identification is one way to operationalize indigeneity, for most coexistent with community-based frameworks, which mostly also include objective factors (influenced by historical settler administrative givens and settler conceptualizing narratives for indigeneity).

As for contesting indigeneity, which can be initiated by individuals, the state, as well as the communities/tribes, the analysis distinguished between contesting groupness, that is, the recognition of a given community as Indigenous; cases involving contestation of tribal membership; and the contestation of the self-identification of individuals as Indigenous in the context of preferential treatment programs and various forms of social positioning that may go beyond a one-time formal preferential treatment, and may be a source of continuous benefits in marketable identity profiles. It has been argued that this latter type of contestation takes place mostly outside the terrain of law and involves informal, social sanctioning.

In sum, the case of indigenous rights showed that conceptualizing, operationalizing and contesting collective and individual statuses shows a great degree of diversity even in the formerly colonized states. These may nevertheless serve as models or points of reference for other (racial, ethnic or national) minorities, but, of course, there is no panacea, because historical givens and the specificities of majority-minority cultural contexts will always require form-fitted tailoring.

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Zsolt Körtvélyesi*

Indigenous Rights in Hungary? Provenance and Repatriation of Human Remains

Abstract. *Indigeneity matters in various ways: it can seek to justify targeted approaches and special guarantees for certain minority groups, but it can also be used more broadly to challenge the surviving legacy of practices rooted in racial hierarchies. The conceptualization of indigeneity, indigenous peoples, and indigenous rights is not without difficulties. This is especially true in Europe, where the definition based on overseas colonization cannot be applied. This chapter demonstrates how indigenous rights can matter even in a state without a legacy of traditional colonization or domestic groups claiming the indigenous label. Some museum and anthropology collections in Hungary hold human remains that originate from indigenous groups around the world and existing international norms and emerging practices in museums and other collections call for reconsidering their display, research, and status. Fulfilling these norms would be necessary to live up to the overall aim of minority rights and undo the surviving legacy of anti-minority violations.*

Keywords: *indigenous rights, cultural artifacts, repatriation, human remains, Hungary*

1. Introduction

According to the United Nations, there are currently around 370 million indigenous peoples, living on 20 per cent of the territory of the globe, and representing approximately 5,000 cultures, thus contributing disproportionately to humanity's cultural diversity.¹ The very terms “indigenous (people/s)”

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¹ United Nations, Department of Economic and Social Affairs, Indigenous Peoples, Mandated Areas, Environment, <https://tinyurl.com/6z9dft4p>

and “indigeneity” are subject to contestation. The more straightforward cases include former colonies with surviving distinctions between groups considered to be descendants of former colonizers and of formerly colonized groups, e.g. in the Americas or Australia and New Zealand. Application in other contexts, e.g. where there was no commonly accepted case of colonization, runs into problems. As in many other cases of collective categories for minorities, indigeneity is also a result of external identification. The five hundred native tribes, some of whom were warring against each other well after the start of colonization,² had little sense of commonality before the devastating effect of European oppression and a resulting common fate.³ This can be likened to the Romani groups in Europe whose collective identity is decisively shaped by external racialization.⁴ In the case of indigenous groups, the label seems to be a misfit for many, or most, ethnocultural communities in Africa and Asia; one can neatly apply the category only in contexts with a relatively clear distinction between colonizers and the colonized. The ambition of universal application mirrored in the current international legal framework disregards this, a bias that can be likened to a new form of colonization.

In Europe, various groups are defined as indigenous, most importantly perhaps the Saami in the North.⁵ International and national regulations alike can use indigeneity to grant rights to certain minorities while denying them to others (see e.g. the debate on Crimean Tatars in Ukraine⁶). The normative questions on justifying the targeted approach and a distinct branch of minority rights under the term “indigenous peoples”⁷ is especially acute if we consider that self-determination and other collective rights are routinely denied to other groups, “national minorities” or certainly groups considered to be “immigrant.” Will Kymlicka, the leading theorist of multiculturalism raises the question whether the separate track of indigenous rights can be

² Drake (2000).

³ See, more broadly, parallels between how Roma communities were treated throughout history. Historian Miklós Szabó draws a specific parallel: “for the Hungarian society of the ’30s, the Roma were Indians (like for the American society at that time, not in the past century), the relationship (including contempt) was patriarchal.” (Later he adds that this relationship of patriarchal stereotypes was transformed by the ’70s, due to assimilation, to hostile prejudice – in a way, from Indians, Roma become Blacks in Hungary.) Szabó (1989) 249, quoted by György (2021) 91.

⁴ For a normative exploration, see Guérard De Latour (2023).

⁵ For some of the surrounding conceptual and regulatory dilemmas, see Gjeldene-Bennett (2021).

⁶ Wilson (2021).

⁷ For definitional exercises, see Thornberry (2002) Chapter 2; Gilbert (2007) 216–218; Rombouts (2017) 171–172. For some of the problems with the exercise of drawing lines, see Kymlicka (2008).

defended, considering the shaky normative foundations and underlying contradictions.⁸

This chapter focuses on a case where indigeneity seems to be missing: indigenous rights in Hungary, a country with weak forms of minority organization and political mobilization and no colonial history that could be likened to countries like Portugal, Spain, France, Belgium, the Netherlands or the United Kingdom. While the indigenous label has rarely been used to denote domestic groups, as a European country following trends in the 19th and 20th centuries of what was considered scientific progress at the time, Hungary acquired indigenous artifacts and human remains. This chapter explores how international norms on the rights of indigenous peoples prescribe action that relates to objects with possible connection to indigenous groups that are also relevant in countries where such objects are held, typically in museums and other collections.

In exploring this topic, I narrow the focus to human remains of allegedly indigenous provenance and argue that, at a minimum, international law requires transparency, i.e. screening collections for related objects that results in a list of items and evidence on facts relevant for judging competing claims, e.g. their provenance and legal status. Further research could explore other types of items, artefacts, and legal obligations that go beyond transparency. Without an honest effort to map existing collections, given the shift in norms related to indigenous human remains, collections risk being pushed to hiding, contrary to the professed goals of most collections, i.e. furthering public knowledge, mostly through open research and display.

The research asks the question whether indigenous rights matter in Hungary, and if so, how; most importantly what policy measures are required to comply with existing norms on minority-related human remains in collections. I start the inquiry by discussing international norms on indigenous human remains to see what these entail in the Hungarian context and contrast this to some preliminary conclusions regarding the current domestic practice.

2. Indigenous rights and repatriation in international law

The international protection of minority rights leaves much to be desired, which explains sustained efforts to develop special regimes, including the approach that addresses the specific needs of indigenous groups. The interest of international law in dealing with indigenous groups predates the decisive

⁸ Kymlicka (2008); Kymlicka (2007a); see also Kymlicka (2007b) Chapter 7.

impetus of decolonization and the “era of restitution.” The ILO has been studying the situation of indigenous groups since its foundation, so this activity goes back to the 1920s.⁹ This work culminated in the adoption of ILO Convention No. 107 in 1957, the first international treaty specifically on indigenous rights. The paternalistic, “civilizing” tone of this document (seeking “progressive integration into [...] national communities”; describing populations as “at a less advanced stage”, etc.) makes it a somewhat embarrassing read today and it was superseded by ILO Convention No. 169 in 1989.

Another key step in developing international indigenous rights is the 2007 UN Declaration. As a result of a long process,¹⁰ the General Assembly of the United Nations adopted the Declaration on the Rights of Indigenous Peoples in 2007,¹¹ establishing a key document for defining the set of rights for indigenous peoples. This marked a great victory for indigenous rights groups that managed to distinguish and elevate indigenous peoples’ rights beyond the meagre developments in international minority rights law.¹² Note that while declarations are not per se binding in international law, the documents and surrounding official statements by state representatives are important indicators for establishing customary law¹³ and particular provisions can overlap with binding norms, which requires detailed assessment to see what legal obligations follow. The four countries that voted against were all, without exception, key players with a stake, i.e. a sizable indigenous population: Australia, Canada, New Zealand and the United States.¹⁴ All four countries have since moved to support the document, e.g. Canada has come out in full support, “without qualifications.”¹⁵ Hungary, on the other hand, did not have such qualms and voted for the Declaration, and publicly has continued voicing support.¹⁶

The Declaration covers various topics from the obligatory non-discrimination rule to a long list of specific protections, including Article 12 that

⁹ Rombouts (2017) 178.

¹⁰ Gilbert (2007).

¹¹ United Nations Declaration on the Rights of Indigenous Peoples, General Assembly resolution, 13 September 2007, A/RES/61/295.

¹² For a comparative account, see Kymlicka (2007b) Esp. Chapter 7. For the argument that studying transnational networks is a key to understand the relative success, see Sargent (2012).

¹³ Barelli (2009): 957–83. For the argument that UNDRIP provisions are binding as general principles of international law, see Barnabas (2017).

¹⁴ See the voting record at <https://digitallibrary.un.org/record/609197?ln=en>

¹⁵ Carolyn Bennett, Speech delivered at the United Nations Permanent Forum on Indigenous Issues. Government of Canada, 10 May 2016, <https://tinyurl.com/5ftfp5nv>

¹⁶ Statement by H.E. Ambassador Katalin Bogyay, at the tenth anniversary of the adoption of the UNDRIP. Permanent Mission of Hungary, United Nations, New York, 25 April 2017, <https://tinyurl.com/3vmdfnbn>

covers rights related to our inquiry. Its first paragraph lists the rights to (1) “manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies”; (2) “maintain, protect, and have access in privacy to their religious and cultural sites”; (3) “the use and control of their ceremonial objects”; and (4) “the repatriation of their human remains”. The second paragraph describes a procedural duty on the side of states: “States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.”

A broader definition of cultural rights is enshrined in Article 11, including a similar second paragraph providing for corresponding procedures: “States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.”

In 2014 states further committed to establishing said mechanisms when they unanimously adopted, in another UN General Assembly resolution, the Outcome document of the high-level plenary meeting of the General Assembly, known as the World Conference on Indigenous Peoples.¹⁷ Its para. 27 reads: “We affirm and recognize the importance of indigenous peoples’ religious and cultural sites and of providing access to and repatriation of their ceremonial objects and human remains in accordance with the ends of the Declaration. We commit ourselves to developing, in conjunction with the indigenous peoples concerned, fair, transparent and effective mechanisms for access to and repatriation of ceremonial objects and human remains at the national and international levels.”

A strong line in the Declaration and indigenous rights more generally is consultation and participation, the obligation to involve the indigenous groups concerned by various policies.

3. Shifting views and norms on indigenous objects

Legal commentary on the Declaration and specifically on repatriation addressed the question of where these rules leave us in terms of the legal status of the said indigenous objects. Tünsmeyer gives a detailed analysis and

¹⁷ Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples, A/RES/69/2, adopted on 22 September 2014.

concludes that there is no established absolute right to repatriation (or to scientific research) and argues that a balancing exercise is the best one can arrive at, reaching compromises that take various competing rights and interests into account.¹⁸ Any such efforts clearly require a transparent process to identify items with indigenous connections, including their provenance.

The balancing exercise that existing procedural solutions also resort to¹⁹ challenges simplified accounts of collections that would be in existential danger or of scientific justifications that always trump “long-buried problems” of how items were acquired. On the other hand, human rights considerations are, as always, meant to have a transformative impact. Repatriation is embedded in the broader context of a remedial process that seeks to secure equality in retrospect as well as for the future. These efforts can be conceptualized on three levels: repatriation is a question of (1) equality, human rights, minority rights (based on formal equality and additional protection), of (2) remedying the history of colonialism and restoring dignity, and of (3) participation, ceding public power to minority groups, granting rights that can take many forms including access, possession, ownership, veto rights etc.

The first approach means that differentiation of the treatment of human remains and other items to the detriment of indigenous communities and individuals should be eliminated and retroactively remedied. The second stage requires broader processes that document and acknowledge illegal or unjust (including those that would be illegal by today’s standards) takings and commit to a process of righting wrongs. The third point describes an active process where affected indigenous communities are treated in a way that acknowledges these historical injustices and are given a say that provides them with information and a position of genuine voice. Such a process will probably not work without an acknowledgement that continuing to ignore the potential legal implications of colonial legacies makes us complicit in them. As Smith notes in the British context, the refusal to repatriate “conveys a powerful symbolic message, however unintentional that may be,”²⁰ e.g. because of a refusal to acknowledge to what extent current collections are themselves a result of colonial history and that they rest on a taken for granted acceptance of “acquisitiveness” as opposed to indigenous claims seen as detrimental to science and progress.

¹⁸ Tünsmeier (2022) Chapter 2.

¹⁹ See e.g. relevant US legislation: Native American Graves Protection and Repatriation Act, Pub. L. 101–601, 25 U.S.C. 3001 et seq., 104 Stat. 3048 (enacted on 16 November 1990) and National Museum of the American Indian Act, Pub. L. 101–185, 20 U.S. Code § 80q–1 et seq. (enacted on 28 November 1989). For an overview, see McKeown (2014).

²⁰ Smith (2004) 408.

Two important and interrelated aspects of indigenous rights should be emphasized here: the participatory and the collective element. To illustrate why they are crucial and how they are linked, let us refer to the question of power over the fate of human remains in possession of various collections. While many readily recognize the right of direct family members or even clearly proven ancestors to decide, the idea that communities have such broader (“collective”) right meets more resistance. As a common trope in how Western concepts fall back on either the individual or the state level, whenever we don’t find such a direct link, the remains go under the umbrella of the central government²¹ and its designed institutions (in these cases, museums and other entities holding collections). This is exactly what is challenged by the logic of indigenous rights: before the catch-all entity of the government, there are communities that fit the nature of certain claims and that should forego the overriding power of the central power. One could call this the non-Western or even anticolonialist feature of these rights, and it is here that the participatory element of indigenous rights becomes essential: while the validity of general laws is not questioned, in the area where indigenous rights apply, indigenous communities have a heightened protection in that their opinion is part of the decision-making process. In the case of human remains, this means that the general laws still provide the overall framework for archeological and other work with these remains, but the concerned community determines the fate of the remains that could be linked to the community. This power arrangement rests on a delicate step, namely the determination of the connection between an indigenous community and the remains, which in turn presupposes the validity of the documentation and related research as well as the transparency of the procedures, standards, and methods determining the connection. As existing efforts, cited above, demonstrate, setting up these procedures and making them work present the challenging task of creating trust in an environment where mistrust is the default setting. This applies for both sides: indigenous communities often see bureaucratic and scientific counterclaims as a thinly veiled defense of the colonialist logic; whereas those possessing these items have to digest the participatory element. The latter implies that the best or most legitimate decision is not necessarily the one that experts find optimal but the one that a democratic process by those concerned bears out. In the more pointed formulation of Keith Kintigh, professor of anthropology at Arizona State University, speaking on behalf of the Society for American Archaeology: “Anthropologists were painfully aware that repatriation may result in the

²¹ For related discussion, see e.g. Frug (1980); Levy (2015).

loss of information about the past. However, we recognize that where a modern group has a reasonably clear cultural affiliation with human remains and objects, that group's desire to control its own material heritage should take precedence over the broader scientific and public interest."²²

On the other hand, it has long been noted that "a significant number of remains in collections are in fact only studied for the first time *because* of the repatriation process",²³ creating opportunities for collections that might have lacked the sources to even catalogue, let alone properly study, items that might have been relegated to collecting dust.

4. State positions and responses

As mentioned earlier, Hungary has supported the Declaration since the beginning. One might dismiss this support thinking that Hungary has no real stake in the debate: without domestic minorities that could be labelled indigenous, no real concessions are required and support is little more than an exercise in virtue signaling with some hint of a generally minority-friendly attitude, explained by its interest in the rights of Hungarian minority communities living in countries surrounding Hungary. And yet, the Hungarian Pantheon includes people who, contributing crucially to the establishment of institutionalized research in Hungary, became involved in European networks of exchange and trade with cultural artifacts from then colonial territories. Much of what was then a progressive trend—bringing home, studying and presenting not only artistic objects but also human remains—would now be a violation of norms that in turn are a result of a later progressive trend in national and international human rights law, cultural heritage law and professional ethics. Digging up graves in distant places under dubious or outright illegal circumstances and engaging in the trade of the resulting remains would hardly pass today's standards. The question that is raised in contemporary discussions is, however, more subtle: what ought to be done with items that are already in collections?

Recent developments include emerging standards for museums to deal with indigenous claims and we can witness prominent European museums that remove these items from exhibits, start negotiations with groups and governments laying claims to them, and, in some cases, return items claimed by indigenous communities, even if these concern objects other than human

²² Emphasis in the original, as quoted in McKeown (2014) 108 and 125.

²³ Smith (2004) 408; citing Rose – T.J. Green – V.D. Green (1996): 81–103.

remains. In 2019, Germany, as part of the negotiations with Namibia on “Wiedergutmachung,” a reconciliation process regarding German colonialism, returned the “Stone Cross,” a 15-century artefact requested by Namibia in 2017.²⁴ France and the United Kingdom returned stolen artefacts to Nigeria in recent years.²⁵ In 2022, Belgium only went as far as handing over an inventory, comprising 84,000 artefacts, to the Democratic Republic of Congo.²⁶ Later that year, they gave back human remains (of assassinated former Congolese leader Patrice Lumumba).²⁷

There are two readings of these developments and they are not incompatible. One is that these cases are still the exceptions to the rule, i.e. that most cultural items remain in collections despite legitimate claims for repatriation. On the other hand, these developments, which include changes in the international legal framework, have started shaping regulations on the national and collections level. On the international level, we have seen developments in indigenous rights law, and the reference to indigenous communities appear in international cultural heritage law, both in the 1995 UNIDROIT Convention²⁸ and the 2003 UNESCO Convention.²⁹ More general references to human rights and ethics standards are part of Council of Europe treaty law developed in the field of cultural heritage.³⁰

We witness similar developments on the level of national institutions. For instance, the latest revision of the document “Restitution and Repatriation: A Practical Guide for Museums in England,” issued by the Arts Council England, sets out a transparent procedure to evaluate claims based on an obligation to cooperate with claimants and taking into account various legal and ethical considerations; factors like the significance to the claimant and the way the objects were taken from their original owners should be weighed.³¹ The decision can result in a change of ownership, loan, right of access or control, or divided ownership.³²

²⁴ Adebayo (2019).

²⁵ Holcombe (2018); Reuters: Nigeria’s looted Benin bronzes returned, more than a century later. *CNN*, 20 February 2022, <https://tinyurl.com/3mk3cxnm>

²⁶ Gijs (2022).

²⁷ Shankar (2022).

²⁸ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Rome, 24 June 1995, Preamble, Arts. 3, 5 and 7.

²⁹ UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, Preamble.

³⁰ Council of Europe Framework Convention on the Value of Cultural Heritage for Society, ETS No. 199, Faro, 27 October 2005, Arts. 3, 6, and 7.

³¹ Arts Council England, *Restitution and Repatriation: A Practical Guide for Museums in England*, August 5, 2022, <https://tinyurl.com/4zttw75m>

³² *Ibid.* 18–20.

An early and exemplary national process that led to strong minority (indigenous) guarantees and that also inspired international trends was the adoption, in 1990, of the Native American Graves Protection and Repatriation Act (NAGPRA) in the United States which mandates, in specified circumstances, the repatriation of indigenous human remains.³³

The International Council of Museums (ICOM) in its Code of Ethics for Museums also includes relevant provisions, including the mandatory regard for concerned communities: "Collections of human remains and material of sacred significance should be acquired only if they can be housed securely and cared for respectfully. This must be accomplished in a manner consistent with professional standards and the interests and beliefs of members of the community, ethnic or religious groups from which the objects originated, where these are known."³⁴

One could go on reviewing changing state practices, but the trend is clear: repatriation is an emerging norm, increasingly seen as part of the efforts to undo the legacy of colonization.³⁵ In the case of cultural artifacts and human remains, the first step, in line with the standards we identified, would be the systemic identification³⁶ of relevant objects with indigenous connections held by institutions in Hungary, as aimed, e.g., by the Africa Accessioned Project that was initiated by the International Committee of Museums of Ethnography.³⁷

5. The status of human remains in Hungary

As mentioned above, Hungary has no minorities considered as indigenous. We know, however, that Hungarian (public) collections include human remains that are most likely of indigenous origin, from various parts of the

³³ On the legislative history leading to the adoption, see McKeown (2014).

³⁴ ICOM Code of Ethics for Museums, 2017, adopted unanimously by the 15th General Assembly of ICOM in Buenos Aires on 4 November 1986, amended by the 20th General Assembly in Barcelona on 6 July 2001, and revised by the 21st General Assembly in Seoul on 8 October 2004, 2.5, <https://tinyurl.com/4b82bj5r>. A similar provision is applicable for research on (3.7) and the exhibition of human remains and sacred objects (4.3).

³⁵ The shift in norms is especially meaningful considering that traditional state responsibility doctrine might not help repatriation claims, see Buser (2017).

³⁶ Full transparency, i.e. the establishment of a public access database, would also not be impossible, as shown by Osteological Research Database of the Museum of London, <https://tinyurl.com/b3x9rwhr>

³⁷ Africa Accessioned project, International Committee of Museums of Ethnography, <https://tinyurl.com/3mdfdjrh>

world.³⁸ We have seen signs that members of the Hungarian expert community are aware of the ethical and professional dilemmas, including the openness to provide information and even repatriate objects held in Hungarian collections.³⁹ Our initial inquiries do not necessarily confirm this openness and the legal overview above suggests that more is needed to bring Hungarian practices in line with international commitments. Instead of a reactive approach to individual inquiries, the state needs to create an inventory that flags all objects of potential indigenous connections. Both provenance, and evidence thereof, and the eventual fate of the objects are harder questions than mere information on the existence and likely origin of the objects.

While I cannot explore details about specific cases in this overview, I can illustrate, in general, what the emerging standards would require as applied in Hungary. In the remainder of the chapter, I focus on how compliance with international obligations as described earlier would not be out of line with professional discussions on ethical standards in Hungary, which very much follows international trends. The central argument is that a more transparent and proactive approach would be necessary to fulfil obligations and remedy the colonial legacy present in Hungarian collections.

A Hungarian journal of museology published a special issue in 2022 on the ethical and professional questions of human remains in collections.⁴⁰ Contributions to the collection discuss the racist origins of the scientific study of skulls often justifying, or taking for granted, racial hierarchies or social Darwinism, and provide a refined presentation of how the collection and study of human remains are not necessarily or exclusively connected to such views.⁴¹ A year earlier, the same outlet already addressed the question, in an article that provides an emphatic description of the process of decolonization that has started in museums around the world. The publication discusses the removal of terminology reminiscent of racial hierarchies, and references ICOM restitution discussions and NAGPRA.⁴² A contribution from the 2022 special issue, by Róbert Keményfi, cites examples from the region of studying

³⁸ The research that also led to the current publication started as a Fulbright Specialist Program “Implementing the Minorities’ Right to the Repatriation of the Human Remains” with C. Timothy McKeown and Viktor Olivér Lőrincz at the Institute for Legal Studies of the Centre for Social Sciences, Hungarian Academy of Sciences.

³⁹ Varga (2024).

⁴⁰ *MúzeumCafé* 16(4) (2022) special issue: “Bone. Piety and Ethics”. The related symposium that included authors from the issue showed the professional interest in the ethical and professional questions of human remains in Hungarian collections. Baranyi (2022). See the programme at <https://tinyurl.com/57pyf99s>

⁴¹ Wilhelm (2022); László (2022).

⁴² Basics (2021). See also Keményfi (2022) 63–64.

Roma and Jewish people with the help of police forces and visits in Sachsenhausen and Dachau.⁴³ The author discusses the scandal of Nazi “science”, the burden of the related skull collection in the Naturhistorisches Museum in Vienna, and the attempts to deal with this, including through repatriation to Jewish congregations and Poland.⁴⁴ Keményfi not only raises Hungarian parallels,⁴⁵ but also follows this up with reflections on how to distinguish between science and pseudo-science, with an inquiry into the normative foundations and social embeddedness of scientific research (instead of the mere insistence that science should somehow be “objective” and “neutral”) and with reflections on the responsibility on the consequences of scientific research, like the legitimizing effect on harmful and dangerous ideologies (in the specific case, on “racial hygiene”).⁴⁶ This leads back to the burden of physical objects acquired in ethically questionable circumstances, sometimes related to racial ideologies or even genocidal acts by regimes ruling at the time, and how the only acceptable way forward is to seek ways to face the burden of this legacy and to devise policies that take it into account.⁴⁷

Judit Worley-Szilágyi laments the declining interest in once highly valued collections that have mostly come from less-than-equal members of society, “the poor, criminals, suicides, and minority groups and indigenous people.”⁴⁸ She then mentions the possible reasons for the declining interest in human remains: the shift in the ethical landscape, the resulting lack of publicizing the existence of collections, and advances in medical science that might make it unnecessary to study these remains.⁴⁹ Hungarian aesthetics scholar Péter György argues that the collections of (often deformed) skulls, brains and bones, losing the context of discredited scientific paradigms, have become mere curiosities on display by the twenty-first century.⁵⁰ As an example for facing the institutional past of biological racism, Worley-Szilágyi discusses examples from Nordic countries with regard to their indigenous (Sami) population, a process of removing all “non-Scandinavian” human remains from display.⁵¹ Uppsala University has human remains from 29 identified Sami

⁴³ Keményfi (2022) 124–126, 127–128.

⁴⁴ Keményfi (2022) 121, 112.

⁴⁵ Specifically citing the example of Lajos Bartucz who rejected the idea of racial distinctions in Nazi ideology and the related pseudoscientific field while legitimizing the latter by accepting to a related leadership position. Keményfi (2022) 122.

⁴⁶ Keményfi (2022) 128.

⁴⁷ Keményfi (2022) 129–130.

⁴⁸ Worley-Szilágyi (2022) 171.

⁴⁹ Worley-Szilágyi (2022) 175.

⁵⁰ György (2021) 73, 90.

⁵¹ Worley-Szilágyi (2022) 178.

individuals, the repatriation of which would be an important step in moving beyond a discriminatory past, towards reconciliation.⁵²

The special issue itself includes a photo of a South American skull (from the collection of dentist József Iszlay),⁵³ part of the “race skull” (“rasszkoponya”) collection of the Anatomy Museum of Semmelweis University,⁵⁴ but what is more important is that there is detailed acknowledgment not only of the indigenous origin of some of the collected human remains but also the unethical and illegal acquisition of most of these objects. Gábor Wilhelm describes the general practice of tomb raiding from peoples not regarded as equal.⁵⁵ This includes Hungarian examples, e.g. Benedek Baráthosi Balogh, Károly Pápai, and János Jankó. The latter disturbed 114 Ostyak tombs in 1898 to get 30 skulls and 2 full skeletons.⁵⁶ The Hungarian collection of human remains includes ones from what are now considered indigenous populations, e.g. by Sámuel Fenichel and Lajos Bíró from German New Guinea and by Sámuel Teleki and Pál Bornemissza from Africa.⁵⁷

As for the way forward, one article specifically references the Swedish practice of identifying all 66 collections in the country that have human remains.⁵⁸

6. Concluding remarks

We have seen that international standards in minority rights create guarantees for indigenous peoples related to human remains and that these trends in international minority rights are part of broader processes of restitution and decolonization, which in turn include related efforts in museums and collections. At a minimum, these norms would require setting up transparent processes for identifying the provenance and indigenous connections of human remains, including those in Hungarian collections. What happens after this identification and information sharing raises hard questions⁵⁹ and this contribution was comfortably limited to the easy part, which at the same time is also outstanding in the case of Hungary: states should proactively

⁵² Worley-Szilágyi (2022) 180–181.

⁵³ See pages 188–189 of the special issue.

⁵⁴ Baksa – Vidra (2022) 187.

⁵⁵ Wilhelm (2022) 53, 60, 62.

⁵⁶ Wilhelm (2022) 54–55.

⁵⁷ Wilhelm (2022) 59–60.

⁵⁸ Worley-Szilágyi (2022) 172.

⁵⁹ See a related discussion from the Hungarian literature: György (2009).

identify human remains and start a transparent process with groups that might have related claims.

The chapter demonstrated how indigeneity matters in a context without the legacy of a colonizing state or domestic groups using the label for claim-making. Discussing and conceptualizing indigeneity matters even in such contexts because it can be used to challenge the surviving legacy of practices rooted in racial hierarchies and other forms of discrimination. For Hungarians, the minority perspective should be easy to entertain, as well as the related violation of the sense of dignity inherent in losing control. The very foundation of Hungarian anthropology goes back to such an experience: Hungarian anthropologists were offended by how skulls, including Hungarian ones, were presented at the Paris World Exhibition of 1878, motivating them to build their own national classification and presentation⁶⁰—in essence, a form of restoring dignity for the group wronged by anti-minority prejudices. The postcolonial legacy also made its mark in Hungarian collections. Undoing this today would require more transparent and proactive approaches in line with indigenous peoples' rights.

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⁶⁰ Wilhelm (2022) 56. Citing Maracsó (2014) 99, who in turn is quoting from Gyula Farkas describing the motivation behind founding the Hungarian Society of Anthropology and Biological Anthropology as follows: “Aurél Török saw skulls of robbers and murderers shown under the label ‘Real Hungarian types’ at the anthropological exhibition.”

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Balázs Dobos*

Individual self-determination or community control? Who can elect European national-cultural minority autonomies?

Abstract. *The aim of the chapter is to present and analyze in a broad outline the solutions offered and currently applied by the leading theorists of national-cultural autonomy, by earlier 20th century examples and by contemporary European practices in defining national-ethnic and indigenous belonging and group memberships. Among the existing practices, the study focuses on the eight countries where the issue of membership is most often raised in the context of elections, since the institutional custodians of autonomy are minority self-governments (Croatia, Hungary, Slovenia), parliaments (Finland, Norway, Sweden) and councils (Estonia, Serbia), established by voluntarily registered voters. It examines how these systems approach voter registration, how they manage group boundaries, how they ensure individual self-identification and group control, and how they ensure that the bodies are sufficiently socially embedded and democratically legitimized. Further questions are how these affect self-determination, participation and strategies within minorities in terms of the extent to which community boundaries become open or closed, whether the issue of possible fraud or ethno-business is raised.*

Keywords: *political participation, elections, non-territorial cultural autonomy, group membership, minority self-governments, minority councils, Sami parliaments*

1. Introduction

One possible institutional solution for the preservation of the identity and characteristics of national and ethnic minorities and the representation of their interests is cultural autonomy based on the personal principle, which, in addition to its ideological and political historical antecedents in the 20th century, can be described as a typical Central European phenomenon in

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practice today. The model seeks to bring together those belonging to a given minority community, regardless of their size and place of residence within a country, in a way that membership, the conceptualization and application of nationality and ethnicity depend on the individual's subjective identification with the community and, in some cases, on the existence of other objective identity traits. In terms of its content, it is mainly cultural and functional in the sense that it mainly involves the management of their own linguistic, cultural, educational and religious affairs.¹

In relation to territorial autonomy, non-territorial autonomy both in theory and practice inevitably raises the question of defining group boundaries and membership,² deciding the complex question of who belongs to a given group and who does not, who should and should not have active and passive voting rights in elected bodies, and who should be authorized to decide. As is well known, there is still no binding definition of the concept of minority in international law, and thus no binding definition of the possible criteria of belonging to a minority. Consequently, states have a wide discretion in deciding which groups to recognize as minorities on their territory and whether to formulate criteria for who belongs to these communities, although, in contrast to earlier practices, the preference for free and voluntary individual self-determination has gained ground since the turn of the 20th and 21st centuries. Indigenous and tribal peoples, which overlap in many respects with minorities, have internationally legally binding definitions and the right to control group boundaries. Their establishment is also the most serious political decision in this respect, because it also inevitably conflicts with the principle of non-discrimination and fundamentally affects power relations within the minority group.

Existing practices for both national-ethnic minorities and indigenous peoples are divided as to the extent to which they rely solely on the individuals' subjective self-identification and choice, or even on possible objective elements,³ such as language proficiency or origin in the case of the Sami parliaments in the Nordic countries. They also differ in whether the criteria for membership of a recognized minority, and thus access to the institutions and resources of autonomy, and guaranteed minority rights, are decided by an external state administrative body or the community itself. The extent of autonomous rights and opportunities has an impact on the value attached to membership in a community. Adding also that, due to different historical legacies, institutional arrangements and group characteristics, minority groups

¹ For a summary, see Salat (2023).

² Bauböck (2001) 9.

³ For a more detailed analysis on how to define possible group membership, see Pap (2023).

may face different challenges in terms of group boundaries, individual choices and potential abuses, while they may also formulate different responses and strategies to similar challenges.

However, the definition of the conditions of membership requires due caution and balance, taking into account in this case the representational paradox that, in order to protect minorities, only group members should be allowed to participate in the establishment and operation of autonomy, most notably through a voluntary register of members. At the same time, autonomy bodies must have sufficient social embeddedness and community legitimacy, i.e. they must be able to reach as many potential group members as possible in a sufficiently inclusive way in order to effectively represent the whole community and, where appropriate, take fundamental decisions affecting the group. A precautionary and inclusive approach, based entirely on individuals' self-identification, risks not only that people with looser ties to the community are left out because of the possibility to join voluntarily, but fraudulent membership by those who are perceived or even declared as not belonging to the community.

Definitions of the latter phenomenon, commonly known as *ethnobusiness* or *ethnocorruption*, highlight the unfair exploitation of the legal framework for the protection of minorities for financial or political gain,⁴ or the abuse of such measures for personal gain against the intentions of the legislator.⁵ According to the most widespread interpretation in the region, such an abuse is most likely to occur when minority rights are sought by a person who, on the basis of some possible objective criterion (origin, language, place of residence, etc.) or census data, which is considered relevant in the given context, is unlikely to belong to the community in question, and whose identity is questioned by legitimate, authentic community leaders whose identity is not in doubt. However, there have also been cases where the person has openly and admittedly not belonged to the minority in question, but merely wished to point out the injustice of the legislation.⁶ The situation is complicated by the fact that, in some intra-community conflicts and electoral contests, even authentic minority leaders have been able to use the opportunity to create more and more dubious bodies under their own control and thus maintain or gain their leadership by securing the required majority. Thus, if a non-member of the community approaches the institutions of autonomy in a way that is controlled and approved by the elite, and without dishonest

⁴ Carstocea (2011) 16.

⁵ Pap (2008) 114.

⁶ See, for instance, Roma jelölt szlovák színekben [Roma candidate on Slovak tickets]. *Népszabadság*, 10 August 2002.

intentions, experience shows that there is little chance that his or her action will provoke widespread protest. While minorities seem to prefer descriptive representation, Andras L. Pap has pointed out in several of his writings that, from the point of view of representation theory, a representative does not necessarily have to share the qualities of the people he or she represents.⁷ However, accusations of ethnobusiness have not only been made within certain divided minorities, but also by external actors, such as municipal councils, if they wished to discredit certain minority self-governments or aspirations in their municipalities.

The examples of ethnobusiness or ethnocorruption shown below have led to several scandals in many Central and Eastern European countries in recent decades, but the boundaries of the community and the identity of some applicants have also sparked controversy over Sami registers, too. Conversely, a more restrictive approach that relies heavily on possible objective elements may keep out those who are only weakly connected to the group, thus weakening its ability to be effectively represented.⁸ In light of the above, the present chapter aims to present and analyze in broad contours the approaches to defining group membership that have been taken by the seminal Austrian theorists of national-cultural minority autonomy, by earlier, 20th century examples, and contemporary European practices. Most notably, in the eight countries where autonomy has been institutionalized by elected bodies, such as minority self-governments (Croatia, Hungary, Slovenia), parliaments (Finland, Norway, Sweden), and councils (Estonia, Serbia), established by voluntarily registered voters.

2. Establishing the criteria for group membership from a historical perspective

From both a theoretical and historical point of view, the idea of cultural autonomy based on the personal principle was based on the work of Austrian social democrats⁹ and later mainly Baltic German theorists and politicians in the interwar period,¹⁰ the 1925 Estonian law as its first practical application, the traditions of Jewish communities in Eastern Europe in self-governance

⁷ See, for instance, Pap (2017) 242–243.

⁸ Suksi (2015) 109.

⁹ Bauer (2000); Renner (2005).

¹⁰ About the works by Ewald Ammende, Werner Hasselblatt, Paul Schiemann, and Mikhail Kurchinskii see, for instance, Eiler (2018); Hackmann (2011); Hiden – Housden (2008); Housden (2014); Housden – Smith (2011); Ijabs (2009).

and the corporative traditions of German minorities.¹¹ At the turn of the 19th century, in the multi-ethnic Austro-Hungarian Monarchy, which was increasingly burdened by internal national-ethnic tensions, the first Austrian theorists of cultural autonomy, Karl Renner and Otto Bauer, called for a formal recognition of nations on a non-territorial basis, in the form of public bodies with collective rights and legal personalities, elected by registered voters, which would cover all group members. The latter, in Renner's view, would have required all citizens of legal age to declare their nationality and, while advocating a subjective approach, would in principle have allowed only one nationality to be registered. He argued that nationality-based taxation by national bodies would be a sufficient barrier to prevent someone from registering as a member of another community.¹² Bauer argued for a free, voluntary rather than compulsory declaration of nationality. However, he criticized practical examples—the 1905 Moravia, 1909 Bukovina, 1910 Bosnia-Herzegovina and 1914 Galicia compromises—, which divided the electorate mainly on national-ethnic, and elsewhere on religious grounds. The introduction of national registers in the constitutions and electoral laws of these provinces tended towards an objective understanding of identity, and in many cases, the authorities began to examine individuals' subjective declarations, even with the help of guidelines to assess and determine national classification externally.¹³

The idea of cultural autonomy was embraced by the left-liberal, Yiddish forces in the Jewish communities of Tsarist Russia before the First World War, but in time, other nationalities also took up the cause. However, it was not until the interwar era that it was put into practice, when legislation was adopted in the territories of the former empire, in the Baltic countries that had gained their independence. In Lithuania, a 1920 law recognized Jewish councils, traditionally elected at the municipal level, which managed their educational and religious affairs and could levy taxes on members. Until the authoritarian regime came to power, Jews in Latvia also enjoyed autonomy, but Estonia stood out among the three countries, where the 1920 constitution already referred to cultural autonomy and declared that everyone had the right to choose freely their ethnicity.¹⁴ As a result, the much-quoted 1925 Minorities Act allowed the German and Jewish minorities to elect their own cultural councils in practice. The law recognized Germans, Russians and Swedes, as well as any minority of at least three thousand people, but the

¹¹ Núñez Seixas (2023) 484–485.

¹² Kuzmany (2023) 985.

¹³ Kuzmany (2023).

¹⁴ Aava (2023) 40, 42.

latter two groups, partly because of their territorial concentration and partly because taxation towards the minority council could have alienated their poorer communities, ultimately did not make use of the autonomy offered by the law.¹⁵

The council could be established for a period of three years if at least half of the adult members of the minority had registered on the minority electoral roll according to the latest census and at least half of those registered had participated in the elections held on a special day. The register was administered by the minority organizations and, despite the efforts of some parts of the German minority elite, registration was voluntary, with individual declarations, initially with “documents proving nationality,” which were not specified in the decree. In practice, the only such document was the identity card, which contained information on nationality. At the time of its introduction, more than 11.5 thousand Germans registered on the electoral roll, nearly half of them in the capital,¹⁶ but registration soon generated controversy over who qualified as German in contemporary Estonia. Compared to them, the registered number of Jews was just over the required 3,000: in 1935, for example, 3,156 of the 3,305 Jewish citizens were registered.¹⁷ Although taxation may have kept some people away, the prospect of German education for children encouraged many, nearly 1,500 by 1931, to attempt to change their nationality to German on their identity cards. However, this was only possible if the card had been issued before the adoption of the 1920 constitution and incorrectly stated the nationality of the person concerned. However, as a result of the increasing number of applicants wishing to change from Estonian to German, who were welcomed by the German minority but were increasingly viewed with concern by the Estonian elite, restrictions were introduced from the 1930s, also in connection with the rise of National Socialism in Germany. The new identity cards issued from 1930 onwards therefore no longer contained nationality, and in 1934 restrictions were placed on who among Estonians could declare themselves German,¹⁸ citing fraud. According to these, those whose ancestors lived in Estonian-majority settlements were automatically declared Estonian. In the case of mixed marriages, if the father was Estonian, his children became Estonian, while if the mother, the children’s nationality depended on the parents’ decision.¹⁹

¹⁵ Hiden – Smith (2006) 393–394.

¹⁶ Housden (2014) 106.

¹⁷ Aava (2023) 43.

¹⁸ Tark (2022).

¹⁹ Aava (2023) 45.

After the Second World War, the idea of cultural autonomy in Eastern and Central Europe easily fell victim to Communist doctrines on the nationality question. Only in the breakaway Yugoslavia, and only in its member republic of Slovenia, were the two small and non-Slavic minorities, Hungarians and Italians, able to establish elected bodies, so-called cultural and cultural self-governing communities of interest, under the 1974 republican constitution,²⁰ in a total of five multi-ethnic municipalities at the time, even if under state control, within the broader framework of Yugoslav self-government. Their elections were later, from 1982 regulated in such a way that, in the case of the Hungarian minority, for example, they were to be “based on the general electoral roll, with the ballot paper being filled in only by members of the Hungarian nationality, which must be indicated on the ballot paper and to which the Electoral Commission must draw attention”.²¹

3. The Sami Parliaments in the Nordic countries

After several earlier institutional models, the Sami parliaments in the Nordic countries have become frequently cited examples of cultural autonomy in Europe since the late 1980s, which can be established by registered voters and not only by citizens of the country in question, regardless of their place of residence in the country. However, the question of how to delimit the boundaries of the specific political community, and to define the right to vote, has reopened debates about group membership, who can be considered as a Sami in the three countries concerned, in addition to individuals’ self-declaration, according to official state criteria and criteria set by the communities.²² Their situation is unique in relation to national minorities in that, as indigenous peoples, they have the right to determine their own identity or membership according to their customs and traditions.²³ While in the case of the Sámi, there is a lack of historical statistical-census data, advanced assimilation, uncertain ethnic boundaries, many have moved from the historical Sámi areas, live mainly in large cities, do not speak the language, do not engage in

²⁰ Ustava Socialistične republike Slovenije, <https://tinyurl.com/54z5kw28>

²¹ A lendvai község magyar nemzetiség oktatási és művelődési érdekközösségének közgyűlése által 1982. február 18-án meghozott statútáris határozat, 15. szakasz [The statutory resolution of the General Assembly of the Hungarian National Interest Community of the Hungarian Nationality of the municipality of Lendava, adopted on 18 February 1982, Article 15]. *Népújság*, 25 February 1982.

²² Nilsson (2020).

²³ UN Declaration on the Rights of Indigenous Peoples (2007), Article 33, <https://tinyurl.com/ya62r5jt>

traditional activities, and thus criteria acceptable to all stakeholders are hardly implementable. In this way, tension arises not only between the subjective declaration and the possible objective markers, but also between the community interests, which seek to control community boundaries and belonging, and the individual's interests in recognition and self-determination,²⁴ since it is often the case that those who are on the electoral roll are considered to be Sami. The dilemma between community and individual interest came to the fore in a particularly striking way in the case of *Ivan Kitok v. Sweden* in the mid-1980s, which was brought before the UN Human Rights Committee. The complainant, who came from a family in the Sami tradition of reindeer husbandry, was denied the right to breed because he had been engaged in other activities for more than three years, and according to the law, he, therefore, lost his membership in the community and was removed from the Lapp register, thereby violating his right to practice Sami culture.²⁵

A few years later, in the context of the establishment of the Sami parliaments, in both Norway and Sweden, criteria for group membership were laid down in law after consultation with the Sami,²⁶ influenced by the widespread view that a Sami is descended from a Sami speaker. However, while the relevant legal regulations in force are broadly similar in defining the criteria for membership, except for a few specific features (see Table), the most inclusive is the Norwegian regulation in practice,²⁷ which is home to the largest Sami community. This is also indicated by the fact that, exceptionally, the language criterion in Norway was extended to include great-grandparents in 1997.²⁸ While in the late 1980s, around 5,5 thousand people were on the electoral register, almost three decades later there were 18 thousand.²⁹ In contrast, in Sweden and Finland, this language requirement goes back only two generations and the scrutiny and in many instances, rejection of registrants has led to several controversial cases, court cases and public disputes, especially in Finland. In Sweden, the preliminary register is made public for a month before elections so that contested cases can be settled, including those whose registration has been challenged by any other group member. Appeals are ultimately decided by state administrative bodies.³⁰ The Sami parliament in

²⁴ Joona (2016) 158.

²⁵ *Ivan Kitok v. Sweden*, CCPR/C/33/D/197/1985 (1988), <https://tinyurl.com/2rvxbzty>. For more on the case and complaints about the Finnish Sami parliament, see also Nagy – Vizi (2024).

²⁶ Josefsen – Mörkenstam – Saglie (2015).

²⁷ Berg-Nordlie (2022).

²⁸ Pettersen (2015) 171.

²⁹ Spitzer – Selle (2021) 558.

³⁰ Mörkenstam – Selle – Valkonen (2022) 299.

Norway, however, was only given responsibility for the register in 2005, until then the registration was carried out by the regional municipalities, whose principles and methods thus also differed somewhat in space and time, creating uncertainty. The electoral register was linked to the population register in 2001 and integrated into the national electoral register in 2005.³¹

Table 1. The legal definitions of Sami in the Nordic countries

	NORWAY	SWEDEN	FINLAND
LEGISLATION	1987 Sami Act ³²	1992 Law on the Sami Parliament ³³	1995 Law on the Sami Parliament ³⁴
WHO QUALIFIES AS A SAMI?	individual declaration, and uses the Sami language at home, or one of his/her parents, grandparents or great-grandparents uses or used the language at home, or child of a person who is already on the electoral roll.	individual declaration, and uses the Sami language at home, or one of his/her parents or grandparents uses or used the language at home, or child of a person who is already on the electoral roll.	individual declaration, and he/she, or one of his/her parents or grandparents has learnt the language as a mother tongue, or a descendant of a person who was listed in the land, tax and population registers as a mountain, forest or fishing Lapp, or child of a person who is already on the electoral roll.

In Sweden, a debate about the liberal descent criterion began in 2016, after a Sami researcher claimed that assimilated Sami had taken over the parliament, and that many people may in fact have little to do with the Sami if they only had one grandparent.³⁵ In contrast to Norway and Sweden, where parliaments seek to increase their electorate, the least inclusive and most controversial practice is in Finland, where the Sami parliament advocates a more restrictive approach and stronger group control. Even though the tax criterion, which it criticizes and ignores, was originally included in the law to cover also those

³¹ Pettersen (2015) 171.

³² Act of 12 June 1987, No. 56 concerning the Sameting (the Sami parliament) and other Sami legal matters (the Sami Act), Article 2–6, <https://tinyurl.com/nhbdtj7c9>

³³ Sami Parliament Act (1992: 1433), Article 2, <https://www.sametinget.se/9865>

³⁴ Act on the Sámi Parliament (974/1995), Article 1(2), <https://tinyurl.com/mr3epxy4>

³⁵ Berg-Nordlie (2022) 452.

Sami who have long since lost contact with the language.³⁶ According to the parliament, however, the admission of already assimilated Sami would endanger the Sami language and culture, especially under this second point of the objective criteria, which is satisfied with an ancestor once registered as a Lapp, and thus, it is supposed, up to 100,000 people could claim official membership on this basis. The problem is linked to the fact that, unlike the other two countries, the roots of Finland's Sami register go back to the 1960s. At that time, students set themselves the goal of interviewing everyone in the Nordic countryside whose parents or grandparents spoke Sami as their mother tongue. The language criterion later became the basis for Finnish law, while today, due to assimilation, there are a decreasing number of people who speak the language and meet the first objective criterion. As for the future, it is only the third criterion that will be the most likely to be dominant when gaining admission. The former interviewing process has also had an impact on the fact that, when the Sami parliament was established, the official Sami territory was largely the same as the area where interviews were held in the 1960s, although this is not the same as their historic homeland. In addition, the interviewers could not reach all the settlements at that time, they could not interview all the people concerned, they usually found the more educated ones, while many could no longer recall exactly what language their grandparents spoke.³⁷

In practice, a five-member committee within the Sami parliament decides on the applicants and appeals against its decisions can be made to the Parliament's executive itself or to the Finnish Supreme Administrative Court. Since the late 1990s, there has been a proliferation of contentious cases, the scale of which is illustrated by the fact that in 1999, for example, 657 appeals were lodged with the Court on the basis of the second point above. However, very few people managed to get on the register on this basis until the early 2010s, when the Court gradually began to change its interpretation. There were rejects who, after moving to Norway, were able to get on the register there without any problems, but there were also cases of people who were registered by mistake.³⁸ In addition, there were also court decisions that favored some persons rejected for not meeting the language criterion, but also a judgment that, interestingly, ordered the inclusion of the complainant in the Sami register on the basis of the subjective criterion alone.³⁹ As a result of the changed judicial practice, in 2015, the former president of the Sami parliament

³⁶ Mörkenstam – Selle – Valkonen (2022) 298.

³⁷ Joona (2016) 166–168.

³⁸ Joona (2016) 166–170.

³⁹ Suksi (2015) 107–108.

de-registered in protest at the inclusion of 93 people on the list who were opposed by the parliament.⁴⁰ In 2015 and 2017, two cases were brought before the UN Human Rights Committee, which ruled against the court in favor of the Sami parliament.⁴¹ At the same time, the court has already rejected a reindeer herder who was descended from four Sami grandparents, but no longer met the language criterion, and his ancestors were not interviewed in the 1960s. In practice, in order to be included in the register, a grandparent who was once interviewed must have known that one of his/her grandparents had used the Sami language at home, even if the applicant no longer has any connection with the Sami community and culture. The problems of defining group membership have led to the situation where even within the same family, family members may be treated differently.⁴²

4. Estonia and Slovenia: electoral rolls administered by minorities

In addition to the Sami parliaments of the three Nordic countries, it is quite exceptional that the legal frameworks of other countries would include, in addition to the individuals' subjective identity declaration, objective elements of affiliation, more or less detailed. An almost unique example in this respect is Slovenia, where although there is no official minority definition, the 1994 Law on Self-Governing Ethnic Communities provides that "The right to vote and be elected a member of the council of municipal self-governing ethnic community is reserved for members of ethnic community that have the right to vote and are registered in a special municipal register of voters of citizens - members of ethnic community."⁴³ According to the current 2013 law on voter registry, members of the Hungarian and Italian indigenous national communities, as well as members of the Roma community recognized in the Constitution, have the right to vote if they declare this to the electoral commission of the community concerned and meet the detailed criteria set by the communities themselves. In defining these criteria, particular account must be taken of the existence of long-standing and strong links with the community, the wish to preserve its characteristics, language and culture, or the applicant is a relative of a person who is already a member of the community. The committee will then apply the applicant to the relevant

⁴⁰ Berg-Nordlie (2022) 452.

⁴¹ *Sanila-Aikio v. Finland* (CCPR/C/124/D/2668/ 2015); *Näkkäläjärvä v. Finland* (CCPR/C/124/D/2950/2017).

⁴² Joona (2016) 170.

⁴³ Law on Self-governing Ethnic Communities (1994), Article 8, <https://tinyurl.com/3j3c5t2d>

administrative unit to be entered on the electoral roll.⁴⁴ In practice, however, the communities are still reluctant to define more detailed criteria: the decisions that have come to light so far on the establishment of voting rights typically only repeat the relevant section of the law.⁴⁵

In the case of the *Hungarian minority*, the umbrella organization, the Hungarian Nationality Self-Governing Community of Prekmurje, in consultation with local leaders, drew up the first draft of the register at the end of 1992, after which voters could comment on it and subscribe or unsubscribe before the next elections.⁴⁶ Abusive cases of registration, presumably of non-Hungarians, occurred only in the 1990s. A more scandalous case was the disappearance of approximately 300 Hungarian voters, including the electorate of an entire village, who had already been on the electoral roll before the 1996 parliamentary elections, while some ethnic Slovene voters also received voter registration notices.⁴⁷

In the case of the *Italian minority*, the electoral commissions assess individual applications on the basis of the documents submitted and, if the information available to them is not sufficient, they may even seek to know the national and linguistic background of the applicants in personal interviews.⁴⁸ In any case, in 2018, consultations were launched among the Italian self-governments to harmonize and jointly develop registration criteria and procedures in order to ensure a uniform system of assessment, avoiding the possibility of establishing different rules for the right to vote in the four municipalities, which could be particularly problematic in the event of rejection and appeals.⁴⁹

In Estonia, as in Slovenia, minorities themselves have the right to compile and manage their own lists and to establish additional objective criteria, in accordance with the relevant legislation and with the possibility of appeal. The 1993 Law on Cultural Autonomy names the German, Russian, Swedish, and Jewish minorities, as well as any community of at least three thousand that meets the legal definition, but so far, only the Swedes and the Ingrian

⁴⁴ Zakon o evidenci volilne pravice, Article 12, <https://tinyurl.com/43tajx2w>

⁴⁵ See, for instance, 2388. Sklep o merilih za ugotavljanje volilne pravice pripadnika avtohtone italijanske narodnosti Mestne občine Koper, stran 7965. *Uradni list*, 2016/54. 1627. Sklep o merilih za ugotavljanje volilne pravice pripadnika avtohtone italijanske narodnosti v Ankaranu, stran 5140. *Uradni list*, 2018/34.

⁴⁶ See, for instance, Felhívás a választói névsor kifüggesztéséről [Call for the publication of the electoral roll]. *Népújság*, 6 November 1992.

⁴⁷ *Népújság*, 21 November 1996.

⁴⁸ See, for instance, Regolamento di procedura della commissione della CAN di Isola per l'elenco elettorale (Izola, 22 February 2017), <https://tinyurl.com/yyndn4e8>

⁴⁹ Aggiornare gli elenchi elettorali particolari, procedure snelle, ma attente, le iscrizioni sono già possibili. *La voce del mandracchio*, 2018/132 (April), 3–4.

Finns have managed to establish their own cultural councils. Inclusion on or removal from the register is at the individual's request. Only registered minority voters can stand and become candidates in minority elections, and candidates must have a permanent residence in the constituency.⁵⁰ According to the law as of spring 2019, the register of voters will contain basic information about minority members to be provided at the time of written application, such as name, personal number or date of birth, and place of residence. Previously, it also included the gender, nationality, mother tongue and religion, marital status and details of children.⁵¹ The competent state body only checks whether the applicant is an Estonian citizen. With regard to the latter, a debate arose as to whether Estonian citizens with Swedish ties who had already moved to Sweden can participate in the elections from abroad. In practice, both Ingrian Finns and Swedes place emphasis on family background when determining eligibility. On their application form, the Swedish minority used to ask applicants to write a few sentences about their relations with the community, mention some issues of importance to the minority and attach a photo of themselves.⁵² A later, bilingual application form asked for personal details, nationality and mother tongue, with the option of Swedish or Swedish in Estonia. The latest 2022 form offered those who filled in the application in Estonian, for example, the option of declaring themselves Estonian with Swedish ancestry, while those who registered in Swedish could enter Swedish.⁵³ The Finnish application form, which is monolingual in Estonian, asks for nationality, and in the section on nationality, it is also possible to indicate whether the applicant has Finnish ancestry.⁵⁴

5. Croatia, Hungary and Serbia: electoral rolls administered by local or state authorities

In contrast to Estonia and Slovenia, the three other Central and South-Eastern European countries with fully elected minority self-governments and councils have a much larger number of minorities, and the competent state authorities, who are responsible for the conduct of elections, compile the

⁵⁰ Vähemusrahvuse kultuurinõukogu valimise eeskiri, 6 May 2003, <https://www.riigiteataja.ee/akt/578630>

⁵¹ National Minorities Cultural Autonomy Act, Article 8, <https://tinyurl.com/43v5fvs9>

⁵² Kultuurinõukogu valimised 2013. aasta sügisel. *Estlandssvensk*, 2013/1, 34. <https://tinyurl.com/4r9ne6du>

⁵³ See, <https://tinyurl.com/vrttms85>

⁵⁴ See, <https://tinyurl.com/4upazwcs>

minority electoral rolls. However, compared to Estonia and Slovenia, problems with registration and abuse were reported in all these countries.

Croatia's constitution states that members of national minorities have the right to express their nationality.⁵⁵ Twenty national minorities, also listed in the Constitution, have so far managed to elect a council or representatives, but the very small numbers of Romanians and Vlachs have not been able to do so. Only those belonging to minorities who reside in the administrative unit concerned and are listed in the general electoral roll as minority voters⁵⁶ in accordance with the law on the electoral register,⁵⁷ which can be recorded from birth by means of an individual declaration, and can be deleted or even amended at the competent county and capital offices without restriction, but can also be left blank. In 2010, the conditions for making changes were simplified, compared to the previous ones, which also allowed for greater manipulation in some cases. From 2021, it is also possible to select the appropriate nationality from a drop-down list by accessing an official website.

In relation to registration problems and possible abuses, for example, before the 2015 minority elections, it emerged that the electoral roll often listed ethnic Croats as minorities⁵⁸ and some Bosnian voters as Muslims.⁵⁹ Between the 2011 and 2015 elections, nearly 37,000 people, and between the 2015 and 2016 elections nearly 6,000 people changed their nationality, although most of them lived abroad and because they had not previously indicated their nationality. In the meantime, however, a Sudanese, Surinamese, Scot, Cypriot, Nepalese and a Palestinian became Serbian, a Rwandan and Zambian Roma, a Tibetan Croatian, and a Tibetan and Tatar Italian.⁶⁰ By autumn 2020, another 38,000 voters had changed their nationality, including one Nigerian to Serbian and one Bolivian to Bosniak.⁶¹ However, among voters living in the country, the change shortly before the parliamentary elections was particularly widespread. There was a major backlash over the registration of Croats, Serbs and Roma as suspected Hungarian voters for money or food before the

⁵⁵ The Constitution of the Republic of Croatia, Article 15, <https://tinyurl.com/m6kwh78b>

⁵⁶ Zakon o izboru vijeća i predstavnika nacionalnih manjina, Article 4, <https://tinyurl.com/yxs4kzsy>

⁵⁷ Zakon o registru birača, Article 12, <https://tinyurl.com/yec4x>

⁵⁸ Manjinski izbori u medijskoj tišini pod teretom grijeha structure, <https://tinyurl.com/4yz3rak8>

⁵⁹ Srbi dobivali SMS-ove s popisom kandidata, Bošnjaci ljuti jer ih vode kao Muslimane, a Romi masovno na glasanju, <https://tinyurl.com/yvjdu3kc>

⁶⁰ 5822 birača u Hrvatskoj promijenila nacionalnost u godinu dana, <https://tinyurl.com/yypzwjaa>; Kad Hrvat poželi biti Dominikanac, a Dominikanac se bolje osjeća kao Crnogorac, <https://tinyurl.com/552unat5>

⁶¹ Kad je čovjeku svega dosta, kaže: Neću više biti Hrvat, nego Pakistanac, Kinez ili Marsovac, <https://tinyurl.com/4ukzb968>

2016 parliamentary elections, which was linked to the fact that previously, in 2015, only a 20-vote difference between the two Hungarian candidates had decided the election.⁶² In the ten months before the elections, the number of registered Hungarian voters increased by more than 850, and in just five days before the polls, 90 voters changed their nationality in Osijek-Baranja county, most of them to Hungarian.

In Serbia, there is no official list of recognized minorities in the constitution or law. The 2002 Law on the Protection of Rights and Freedoms of National Minorities provides only a definition of minority and stipulates that an application for the compilation of a minority electoral register may be submitted by adult members of any national minority meeting the definition, who constitute at least 5% of the census population, but not less than 300 persons.⁶³ The 2009 Law on National Councils subsequently named the Jewish community alone, stating that the Executive Board of the Union of Jewish Communities in Serbia performs the function of a Jewish national council.⁶⁴ In practice, 23 minorities have so far been able to establish their minority councils directly or indirectly. The Aromanians or Cincars, who according to the census did not even reach 300 people, did not manage to collect the required number of signatures. Unlike Croatia, in Serbia, those wishing to participate in the elections must register in a separate minority electoral register, which is managed by the relevant ministry on an ongoing basis, but registration is carried out by the local administration.⁶⁵

Electoral abuses have come to the fore in Serbia from several, albeit inter-related, angles. On the one hand, in the first direct elections to the national councils in 2010, the data protection ombudsman expressed a suspicion that political party activists were registering others on the minority register without their knowledge or will, a possibility that was later removed with the introduction of exclusive individual registration. However, this did not prevent mainstream Serbian parties from using their infrastructure and resources to influence certain minority elections in such a way that they could reach the threshold for direct elections or affect the results of the elections with their own candidates or lists they support. In addition, there have been accusations that, for example, in the case of the Vlach National Council, party

⁶² Šokantno bujanje mađarskih birača na izborima! Na potezu je policija, <https://tinyurl.com/3vxtsxj2>

⁶³ Law on the Protection of Rights and Freedoms of National Minorities, Article 2, 44, <https://tinyurl.com/2nnz5fz7>

⁶⁴ Law on the National Councils of National Minorities, Article 134, <https://tinyurl.com/4mj6c7ja>

⁶⁵ Law on the National Councils of National Minorities, Article 32. Pravilnik o načinu vođenja posebnog biračkog spiska nacionalne manjine, <https://tinyurl.com/bdzav6b2>

activists who did not belong to the community were also registered.⁶⁶ Similarly, in the case of the Romanian minority, through abuses, including falsification of signatures and electoral lists, as well as extortion, political parties managed to elect ethnic Serbs and Romanians from their parties to the Romanian National Council.⁶⁷

In Hungary, the conditions for access to the right to vote and to exercising the right to stand as a candidate have been tightening steadily since the mid-2000s, in the wake of the increasing number of high-profile electoral abuses, including the failure to elect the National Romanian Self-government in 1999 and the 2002 local elections of the Roma self-government in Jászladány.⁶⁸ This included the fact that, while in practice non-Hungarian citizens could vote in the elections of minority self-governments in the past, after 2006 this was no longer possible, except in 2014, especially for minority citizens, who are mainly EU citizens and have minority ties, and there is a minority demand to include them.⁶⁹ According to Act 114 of 2005 on the election of minority self-government representatives and on the amendment of certain acts concerning national and ethnic minorities,⁷⁰ only Hungarian citizens who had the right to vote in local elections and had declared their minority affiliation and registered in the minority electoral register prior to the election, which was managed by the local election office without any objective criteria, were allowed to vote. Elections could be held at the local level if the number of people on the register reached 30 on the day of the election. Voting took place on the same day as the election of local councilors and mayors, but in different polling stations. The electoral roll had to be destroyed immediately after the results of the election had become final. Candidates could only be nominated by minority nominating organizations that fulfilled the statutory requirements, and candidates had to declare their knowledge of the language, tradition and culture of the community and whether they had previously been a member or an official of another minority self-government.

The tightening conditions have not been able to completely prevent people who are presumed or even declared to be not members of the given community from registering on the electoral roll and running dubious minority organizations to be elected and become representatives in minority self-government elections, as in the case of the dubious Ukrainian self-governments

⁶⁶ Novaković – Đurđević (2015) 74–75.

⁶⁷ Hein (2014) 133–134.

⁶⁸ For a more detailed analysis, see Pap (2018) 98–101.

⁶⁹ Majtényi (2006).

⁷⁰ Act 77 of 1993 on the Rights of National and Ethnic Minorities (as of 25 November 2005), <https://tinyurl.com/49ws9uaw>

in Borsod county⁷¹ or the local Romanian and Rusyn minority elections in the village of Szalonna.⁷² As a result, the Act 179 of 2011 on the Rights of National Minorities⁷³ has included census data in the electoral procedure, as in Croatia and Serbia, with the requirement to call elections at the municipal level, if the number of persons belonging to the given ethnic group reaches 25 according to the aggregated data on minorities from the last census. As in the other two countries, the national electoral register is managed centrally and continuously by the National Electoral Office, which can be registered or deleted by individual request. Candidates must now declare that they speak the language of their minority, in addition to the previous requirement. Finally, the law now excludes from standing as a candidate those who stood as a candidate of another minority in the previous two general elections or in the subsequent by-elections. However, the lack of regulation of the subjective conditions of belonging to a minority and the lack of recognition by the community still allows for electoral abuse.⁷⁴ In sum, even further tightening has not been able to prevent Armenian voters registered in homeless shelters⁷⁵ and pseudo-Romanians⁷⁶ from making the news in the elections in the 2010s.

6. Concluding remarks

The dilemma of representation in the case of non-territorial minority autonomies is particularly important in the context of legitimacy: whose autonomy is at stake, by whom and for whom? This chapter has undertaken an overview to examine how the complex issues of voter registration, self-identification and group boundaries are approached in the cases of elected autonomous bodies. The electoral component of these systems inevitably raises the question of how to delimit and define the political community while preserving the freedom of individuals to express their identities and ensuring the

⁷¹ See Kisebbségi választás – viták közepette alakult meg az ukrán országos önkormányzat [Minority elections - Ukrainian national self-government formed amid disputes]. *MTI*, 5 February 2011.

⁷² See Etnobiznisz miatt tesz feljelentést a Jobbik [Jobbik denounces ethnobusiness]. *MTI*, 13 September 2010.

⁷³ Act 179 of 2011 on the Rights of National Minorities (as of 21 December 2017), <https://tinyurl.com/2mfbtxj6>

⁷⁴ For the relevant constitutional court decisions, see Nagy (2022) 39–53.

⁷⁵ Önkormányzat 2014 – Kisebbségi jelölt: a választás előtt nőtt meg a magukat örménynek vallók száma a VIII. kerületben [Local government 2014 - Minority candidate: the number of people claiming to be Armenian increased in the VIII district before the election]. *MTI*, 9 October 2014.

⁷⁶ *Ecranul Nostru*, 13 November 2019, <https://nava.hu/id/3582013/>

democratic legitimacy of the bodies. Furthermore, there is the question of how formal recognition of communities, external classification and institutional contexts affect self-identification, participation and strategies in terms of the extent to which community boundaries become open or closed, and whether the question of possible fraud or ethnobusiness is raised or interpreted.

An examination of the practices in the eight countries leads to the conclusion that the dilemma can be somewhat mitigated if the community has a role in controlling individual self-identification and group boundaries, determining membership issues and objective characteristics. Indeed, in countries where this system is applied, notably Estonia and Slovenia, no alleged electoral abuses have been reported; in this respect, the Slovenian practice in particular seems to be the most viable. However, this finding should be treated with caution and calls for further research, as it may be linked to the specificities of the minorities concerned, which, despite their small size and favorable socio-economic integration, all tend to expand their boundaries towards more assimilated segments, making possible abuses virtually meaningless. The Slovenian example is also interesting in that, although there is no formal definition of minority, the legal prescription and application of criteria for membership in the national community does ultimately provide an opportunity to formulate the former.

In contrast, the participation of those who are, at best, only interested in a minority community but do not belong to it, is more likely to provoke scandals and resistance in the three countries (Croatia, Hungary, Serbia), where the register is managed by state actors on the basis of the individuals' self-identification. This indicates the strength of national-ethnic identity, as well as the different interests, strategies of boundary-making, identity construction and mobilization of the actors involved, who have rejected access to minority rights for non-community members, not necessarily on moral grounds alone but based on a simple rational-mathematical calculation to increase their chances in electoral contests. While the questioning of identity, suspicions and accusations of fraud and ethnobusiness have in many cases become standard practice not only in debates within individual minorities about representation, legitimacy and credibility, but also by external actors to undermine certain minority efforts to organize and mobilize themselves, which also call for further research on the subject.

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Eszter Kovács Szitkay*

The bumpy road of ethnic data in Hungary. Regulations on law enforcement authorities

Abstract. *The chapter explores the relationship between ethnicity and data protection regulation and practice from a Hungarian context. Its aim is to outline a problem-posing line of thought on the recurring appearance and disappearance of ethnic data in law enforcement work. In a country such as Hungary, where in principle the collection of such data is subject to very tight and strict regulation, the trajectory of such data can be partially traced, but many of its parts are obscured, a feature worthy of attention not only for its regulatory solutions, but also for its implications for criminology and ethnic profiling, for example. The dilemma is clear: we are dealing with highly sensitive data in an environment that could easily leave the subjects concerned in a vulnerable position; hence, knowledge of the practical steps of the procedure is crucial. As the regulation presented in this chapter indicates, beyond the dilemmas mentioned above, the practice must also face up to its inconsistency and contradictory nature. In order to unravel this emergent and vanishing dynamics of ethnic data, the chapter adopts the following thematic approach: first, it clarifies its concept and legal framework in the Hungarian context, including regulation at the European level, followed by a presentation of examples from the spectrum of law enforcement work, and finally concluding with the findings.*

Keywords: *ethnic data, law enforcement, data collection and process, Hungary*

1. Introduction

The debate surrounding the concept, collection and process of ethnic data have long been of concern to both theorists and practitioners, not to mention legislators—how to capture it, what the pros and cons of its collection are, what it should be used for, and ultimately how it relates to human rights;

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ethnic data collection is “a complex issue, particularly because of the great variety of stakeholders whose consensus it presupposes: minority communities, statisticians, data protection agencies, equality bodies and policymakers.”¹ Practices in this area also vary within the European Union,² given the different interpretations of international and European legislation by national authorities;³ some take a more restrictive,⁴ others a more pro-collection stance, with appropriate regulation and objectives.⁵ Two major camps emerge: one view is that the collection of ethnic data essentializes ethnic groups and contributes to racial discrimination, while others see “migration, language, education level and poverty data are not effective proxies for measuring discrimination based on racial and ethnic origin.”⁶ Thus, their collection and process may arise in many areas, even indirectly,⁷ and in terms of their purpose, referring back to the previous sentence, equality and anti-discrimination efforts are strongly marked.⁸

Ethnic data—i.e., information on ethnicity (I am using “race” and “nationality” as synonyms, although they can mean different things in terms of content⁹)—when it arises in the course of law enforcement activity, presents

¹ Farkas (2017) 6.

² “Research on national practices shows that there is great discrepancy among Member States regarding the terminology, methodology, format of questions and sources used to collect data on racial or ethnic origin, if they do so at all.” Van Caeneghem (2019) 163.

³ Van Caeneghem (2019) 171.

⁴ “Research shows, however, that many EU Member States interpret data protection legislation restrictively, thereby hindering data collection for anti-discrimination purposes.” Van Caeneghem (2019) 172. In footnote 112, Van Caeneghem points at the ENAR Shadow Report, which—among other countries—mentions Hungary which follows the before-mentioned interpretation.

⁵ For country practices, see Balestra – Fleischer (2018).

⁶ Farkas (2017) 6.

⁷ See e.g. van Bekkum – Zuiderveen Borgesius (2023) 3.

⁸ Balestra – Fleischer (2018) 12.

⁹ “Race is a controversial category. In the social science literature, it is widely understood to be a social construct

rather than a biological trait (in the biological sense, the entirety of humanity constitutes one single race) without a theoretically or politically uniform definition” (italic in original text) Pap (2015) 33. Regarding nationality, we can rely on the term set out in Recommendation 1201(1993) of the European Council: “For the purposes of this Convention (1) The term ‘Convention’ in this text refers to the Convention for the Protection of Human Rights and Fundamental Freedoms., the expression ‘national minority’ refers to a group of persons in a state who: a. reside on the territory of that state and are citizens thereof; b. maintain longstanding, firm and lasting ties with that state; c. display distinctive ethnic, cultural, religious or linguistic characteristics; d. are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state; e. are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language.”

a complex and difficult-to-follow picture in the Hungarian context. The (personal) data can be any information relating to the data subject, who is or can be identified from any piece of information.¹⁰ In principle, it can be encountered in several places in the course of law enforcement activities: it appears as a factual element in the context of hate crimes, it appears in the list of prejudice indicators defined in ORFK Order No. 30/2019, 18 July of the Chief of the National Police on the implementation of police tasks related to the handling of hate crimes, or in ORFK Order No. 22/2011, 21 October on co-operation and liaison between the body established for the performance of general police tasks and the Roma minority self-governments, but it also appears in ORFK Order No. 27/2011, 30 December on police measures in multicultural environments. The question under examination is whether all this produces data in a procedural, documentary sense, either from the side of the person concerned or in a concrete or aggregated form, and how this is reflected in law enforcement activity? The chapter seeks to capture a snapshot of the status of this data in a particular segment of law enforcement activity, and to formulate critical reflections that point to the inconsistencies that arise from the regulation. My aim is not to provide a “literature review,” but rather, through the presentation of the literature, to highlight anomalies and contribute to the ongoing professional discourse on this issue.

At the outset, it is important to point out that, contrary to appearances, the processing of ethnic data is intended to facilitate the achievement of legislative objectives and the efforts to eliminate institutional discrimination.

The chapter has the following structure: after a brief introduction of the Hungarian legal environment, I will present the practice of the collection and processing of ethnic data, pointing out examples from the field of law enforcement practice, and conclude with critical problem statements.

2. The legal embeddedness of ethnic data

2.1. Briefly about the relevant regulation at the European level¹¹

At the European level, the Council of Europe 1981 Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data and Protocols (Convention 108(+)) and Regulation (EU) 2016/679 Of The European Parliament And Of The Council of 27 April 2016 on the protection

¹⁰ Infoact, Article 3 (1) and (2).

¹¹ For more information, see Van Caeneghem (2019) chapters 3.5.1–3.5.2.

of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR) apply. Basically, the rules on the processing of ethnic data are discussed in the context of sensitive data, as “Personal data revealing racial or ethnic origin are among the special categories of data the processing of which may lead to a violation of data subjects’ rights, including the right to privacy, because of their specific nature.”¹²

According to Article 6.1-2. Convention 108(+): “1. The processing of: [...] personal data for the information they reveal relating to racial or ethnic origin, political opinions, trade-union membership, religious or other beliefs, health or sexual life, shall only be allowed where appropriate safeguards are enshrined in law, complementing those of this Convention. 2. Such safeguards shall guard against the risks that the processing of sensitive data may present for the interests, rights and fundamental freedoms of the data subject, notably a risk of discrimination.”

But the existence of these safeguards is often interpreted by states as a kind of prohibition in practice.¹³

While Convention 108(+) is more permissive, the GDPR prohibits¹⁴ the processing of sensitive data, including ethnic data, Article 9.1.: “Processing of personal data revealing racial or ethnic origin [...] shall be prohibited.” But it also includes a list of cases that are exempt: Articles 9.2–9.3 GDPR. “The extensive list of exemptions included in the GDPR gives Member States a margin of manoeuvre in relation to the lawful processing of sensitive data. This opens the door for the adoption of legal frameworks for equality data processing.”¹⁵

It is important to note that they do not address the definition of ethnicity either.

2.2. National law

Ethnic data is defined in Act CXII of 2011 on the right to informational self-determination and on the freedom of information (Infoact) as Article 3 (3) “personal data revealing racial or ethnic origin”, which is categorised as personal data that is also considered sensitive data.¹⁶ This regulation does not in itself shed light on what ethnicity or the related conceptualisation

¹² Van Caeneghem (2019) 213.

¹³ Van Caeneghem (2019) 214.

¹⁴ Van Caeneghem (2019) 216.

¹⁵ Van Caeneghem (2019) 218.

¹⁶ Infoact, Article 3 (2) and (3).

problematic means, so for a clearer conceptual framework I will take the approach of Andras L. Pap, who foresees that the imprecision and inconsistency in the application of the concepts causes many problems. On the concept of “race,” we learn that there is in fact a scientifically proven existence of one race, i.e. humanity belongs to one race, and that different “racial characters” do not refer to different races; and that “ethnicity” “refers to social groups whose members are linked by a common origin, tradition, ancestry, language or culture. Accordingly, ethnicity may change over time and cannot be clearly established by an outside observer.”¹⁷

Concerning data protection, the law lays down strict rules to protect personal data, especially sensitive data. Accordingly, if the personal data is also considered as sensitive data, its processing is authorised as follows according Article 5 (2) of the Infoact “Sensitive data (a) as set out in points (c) to (d) of paragraph 1; or (b) may be processed if absolutely necessary and proportionate for the implementation of an international treaty proclaimed by law or if ordered by law in the interests of the fundamental right guaranteed by the Fundamental Law, national security, the prevention, detection or prosecution of criminal offences or in the interests of national defence.” Article 5 (1) (c) “except as provided for in point (a), necessary and proportionate for the protection of the vital interests of the data subject or of another person, or for the prevention or elimination of an imminent threat to the life, limb or property of a person; or (d) in the absence of point (a), the personal data have been explicitly disclosed by the data subject and the disclosure is necessary and proportionate for the purpose of the processing.”

We can see that there is a strict framework for the treatment of ethnic data. This strictness is a result of the change of regime: until the 1990s it was possible to collect such data; for example, between 1971 and 1989 offenders of a Roma origin were still counted. However, this practice was ended by Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Data of Public Interest (DPA), which defined ethnic data as sensitive data. Therefore, after that, its recording or disclosure required legal authorisation or the written consent of the data subject.¹⁸

In the 1990s, the interpretative framework for the protection of personal data changed, and the Constitutional Court now regards it as a right to informational self-determination. In this light, we should mention two Constitutional Court decisions, the principles of which led to the adoption of the DPA and then the Infoact: “The Constitutional Court—continuing its

¹⁷ M. Tóth – Pap (2012) 244.

¹⁸ Kerecsi – Gosztonyi (2014) 239–240.

practice according to the Constitutional Court Decision 20/1990—interprets the right to the protection of personal data not as a traditional right of protection, but also taking into account its active aspect, as a right of informational self-determination. Accordingly, the right to the protection of personal data, as guaranteed by Article 59 of the Constitution, has the content that each person has the right to decide for himself whether his personal data are disclosed and used. The collection and use of personal data must therefore be subject to the consent of the person concerned; the entire processing chain must be made transparent and verifiable for everyone, i.e. everyone has the right to know who, where, when and for what purpose their personal data are being used. By way of exception, the law may provide for the mandatory disclosure of personal data and may also prescribe the way in which it is used. Such a law restricts the fundamental right of informational self-determination and is constitutional if it meets the conditions required by Article 8 of the Constitution.¹⁹

I would add—referring to the legal regulation already set out above—that if there is a legal basis for data processing, then the relevant data can be collected.

Let's see some examples! These include hate crime offences, as well as the ORFK orders mentioned above and the prejudice indicator list, to be explained later, which create a legal basis and obligation for data processing.

3. Ethnic data in criminal justice

It is necessary to briefly look at the link with the criminal justice system. Despite the fact that the strict rules of the Infoact allow room for the processing of sensitive data and in the cases mentioned above it is based on a legal obligation, I have assumed that ethnic data is widely used in the procedure, but the conclusion is the following: such data is not actually collected by the criminal justice system in any form, even if a legal fact would suggest its presence or other regulators suggest a legal basis for it (e.g. an ORFK order).

To summarise, in the context of law enforcement, the judiciary and the penitentiary system, the ethnicity of persons is not recorded,²⁰ hence not only individual data but also statistical statements (i.e. not traceable to specific persons) are not produced; neither the various data sheets nor the various registration systems have the IT facilities (a rubric, if you like) to record it.

¹⁹ Reasoning of the decision of the Constitutional Court No. 15 of 13 April 1991.

²⁰ Kerezsi – Gosztonyi (2014) 240.

Typical cases where ethnic data is generated—i.e. not recorded statistically—can be extensive, both in terms of cases and individuals, with the victim, perpetrator and witness all being able to generate such data.

The simplest is when the perpetrator or victim voluntarily declares their ethnicity, which may be relevant to the investigation/ criminal proceedings. In practice, this information is not recorded, it is merely presented as part of the facts in a “free text” way. The next case relates to hate crimes: since the victims may not immediately identify themselves as the victims of such a crime, it is sometimes the case that the competent authority has to carry out a legal reclassification based on the list of indicators laid down in ORFK Order No. 30/2019, 18 July on the implementation of police tasks related to the handling of hate crimes, i.e. from hooliganism to violence against a member of the community, and thus ethnicity is revealed.

This list of indicators includes the following, in accordance with point 8 of the ORFK Order: “8. In the event of a hate crime incident, the following prejudice indicators to help identify hate crimes should be recorded in the police report of the incident and investigated in the criminal proceedings: (a) the perception and opinion of the victim or other witness, in particular with regard to possible victim cover-ups due to shame; (b) the characteristics, appearance and manifestations of the suspect in relation to the offence, in particular the gestures used, the clothing worn, the verbal expressions used; (c) a perceived or real group difference between the suspect and the victim, which may include persons acting on behalf of or belonging to the victim; (d) the victim’s appearance and behaviour, typically his/her preferred/chosen location, the foreign language or accent he/she uses, clothing that symbolises race or religion; (e) the suspect’s bias, which may be indicated by the programmes/events he/she attends, preferred bands, reading material, social media platforms, preferred bands, reading material, social media platforms; (f) the participation of organised hate groups, which may be indicated by the appearance and gestures of the suspect group, or by the group itself (by participating in the commission of the crime); (g) the location of the offence, which may be indicative of the victim’s community or linked to a previous hate crime; (h) the date of the act, which may be linked to holidays or events in the victim’s community or to historical events favoured by the suspect; (i) the extent, manner and means of the violence, in particular its exaggerated or particularly humiliating, self-serving or symbolic use; (j) the public, which is primarily intended to convey the perpetrators’ message; (k) the absence of any other motive, in particular the abuse or humiliation of an unknown victim without any previous offence.”

According to the European Court of Human Rights, the mere existence of a single circumstance of prejudice obliges the competent authorities to do their utmost to detect possible racist motives,²¹ which, if not done, would be a violation of the European Convention on Human Rights.²²

Moving away from hate crime, one general area is worth mentioning: characterisation. A witness's description of the perpetrator is recorded by means of the description method, which is also used to search for the person. In this case, for example, although such a description may point to a specific ethnicity—or the witness may make such a statement about the perpetrator—this is not stated *expressis verbis* in the description of the wanted person.

Overall, therefore, no ethnic data will be generated in the criminal proceedings, so we cannot explore the way forward. However, this information is already very important for us, because it will allow making critical observations that will help us to shed light on the anomalous situations that arise from this kind of processing of ethnic data and how that, despite the best intentions, causes problems in practice.

4. Forensic considerations

Personal information about the suspect, with physical attributes being an important component, plays a major role in the detection of crime. The description of the person can be used in criminal proceedings in a number of cases: to locate and identify the perpetrators of crimes, to locate and apprehend suspects in an unknown location, to locate missing persons, to locate unidentified bodies, to identify persons of unknown identity, i.e. persons who cannot or do not want to identify themselves, or for certain tactical methods of criminal investigation and team tactics.²³ All this shows that the uniqueness of a person's external or internal characteristics can be used in many areas. And the description of the person: "a forensic tool for the identification of a person and a corpse or body, which contains differentiated information with regard to the principles and subject of the description of the person: the general human biological characteristics (biological sex, age, height, weight, body composition, type and location of obesity, posture, colour composition); the shape of each part of the body (size, shape, asymmetry, deformity of the face and body parts); functional criteria (gait, speech, behaviour, smell); and

²¹ Kirs – Pap (2016) 71. See *Nachova and others v. Bulgaria*, nos. 43577/98 and 43579/98.

²² Pap (2019) 49.

²³ Anti (2017) 75–82.

other characteristics (tattoos, body jewellery, clothing, etc.), i.e. the description of general characteristics and particularities (special features).²⁴

We can see the wide range of characteristics that can be recorded in the course of the description of a person, which can be used to give a very accurate picture of the person, but according to previous practice, it is not used for identification but for recognition, it is used for detection, and is only indirectly involved in evidence.²⁵

With a special focus on the search for wanted persons, Article 3 (2) c) of Act LXXXVIII of 2013 on the wanted persons registration system and on the search and identification of persons and objects lays down the following—closely related to our topic: “(2) The register of wanted persons shall contain the following data: c) specific data revealing the racial origin, religious beliefs, sexual behaviour or political opinions of the requested person”.²⁶

How can we interpret these frameworks? On the one hand, we see that person specification provides a wide scope for the detection and description of these attributes, so that the possibility of capturing characteristics that could be said to be specific to an ethnicity by creating a person specification is present. The statutory Article cited only addresses race, but we can treat these concepts as synonymous—which I have explained by explaining the concepts—so presumably the Article is about being able to clearly identify, for example, a person of African-American descent. So we can be careful to indicate that we can find suggested legal basis even in this case. The serious problem, however, is that neither the law nor its explanatory memorandum provides a conceptual framework for what is meant by race—so we cannot know how and in what ways ethnicity is different—and so conceptualisation is lacking. As explained above, this issue is far from clear-cut. The European Union Agency for Fundamental Rights also states, in the context of ethnic profiling, that “The description of the suspect, which is based on the description of the crime victim or witnesses, includes personal information such as skin, hair and eye colour, height and weight, and clothing worn. A good suspect description provided to the police can be used to carry out stop and search operations to take suspects into custody. However, if law enforcement officers are provided with an overly general suspect description that includes

²⁴ Anti (2017) 65.

²⁵ Anti (2017) 73.

²⁶ I will only mention here that Act XLVII of 2009 on the criminal records system, on the register of convictions handed down by the courts of the Member States of the European Union against Hungarian nationals and on the register of biometric data in criminal and law enforcement matters, was supposed to provide guidance in the detection of the “road” in question, but in the end it did not provide any relevant information.

racial, ethnic and other similar characteristics, they cannot use it as a basis for actions such as stop and search, as many innocent persons who share these characteristics are likely to be stopped.”²⁷ It is not that this is specifically forbidden, but such a general wording could indeed lead to misleading, discriminatory actions, and therefore it is not appropriate in itself.

An interesting attitude can be detected when, for example, the nicknames of Roma people include the ethnicisation of external characteristics in everyday life: black hair, brown, sooty skin, etc., but in the course of the description of the person, it is still necessary to pretend that society does not use or know them, so that when the person giving the description refers to such characteristics, the authority in charge does not record it in a way that clearly identifies ethnicity. Thus, although the description could indirectly create a legal basis for recording ethnicity, the actual legal provisions do not follow this interpretation.

5. Aggregated and individual case-specific data

5.1. Predictive policing and automated justice

In this subchapter, I will describe the mechanisms that are at the heart of performing operations on data, and I will use this brief description to illustrate the importance of performing operations on data that do not ultimately distort the result. In a broader sense, by this information gap: “[...] we make it much easier for criminal justice actors: they do not have to face the question of whether there is discrimination in the justice system, and they do not have to do anything about it, because there is no verified information or research data available. So we know little about the drivers of crime, and especially little about its municipal and neighbourhood aspects.”²⁸

Predictive policing and automated justice are computer methods and software that help law enforcement agencies by using calculations to predict where, when and who will commit criminal offences. It is predictive analytics, so it is not just about collecting masses of data to look for patterns, but also making predictions for the future. Further, it is also necessary to distinguish between predictive policing (which focuses on crime prevention and investigative solutions) and automated justice (which aims to make prosecution and sentencing objective). One of the most important pieces of information

²⁷ European Union Agency for Fundamental Rights (2010) 63.

²⁸ Kerezsi – Gosztonyi (2014) 237–238.

for the topic is that in both cases, the data collected on crime and criminality form the database that is processed to achieve the stated objectives.²⁹ One form of automated decision-making is profiling, the content of which is also laid down in Article 3 (27) of the Infoact: “profiling means any processing of personal data by automated means intended to evaluate, analyse or predict personal aspects relating to the data subject, in particular his or her performance at work, economic situation, state of health, personal preferences or interests, reliability, behaviour, location or movements.”

Here we also need to talk about ethnic profiling. Balázs M. Tóth and Andras L. Pap introduce the following concept: “Ethnic profiling occurs when, in the course of law enforcement, law enforcement or other activities where the person acting in an official capacity has the authority to take legally binding action against targeted persons, and the selection of the persons to be targeted is made with at least a minimum of discretion and is based on the ethnicity or colour of the person concerned.”³⁰

What we can observe with these concepts is that we can see the distortion caused by the lack of recording of ethnic data: since collection is not possible, predictive policing and automated decisions will give us misleading information to guide us³¹ and, more importantly, create huge obstacles to preventing acts of discrimination.³²

It is necessary to mention the recently adopted European Union regulation on artificial intelligence (EU AI Act),³³ as it is a relatively recent development. Contrary to the General Data Protection Regulation (GDPR) of the European Union, which does not apply to “the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security and the free movement of such data”—since it is regulated by Directive (EU) 2016/680 of the European Parliament and of the Council³⁴ (GDPR

²⁹ Harmati – Szabó (2020) 25–26; see also Kisfonai (2023).

³⁰ M. Tóth – Pap (2012) 47.

³¹ For more on the misleading inferences that can be drawn from data and the importance of the context in which the data were generated, see e.g. Heaven (2020); Grierson (2019).

³² On a different topic, but on the prevention of discrimination in AI, see van Bekkum – Zuiderveen Borgesius (2023).

³³ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (Text with EEA relevance).

³⁴ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by

Recital 19)—, the EU AI Act includes a prohibition on predictive identification based solely on profiling or on the assessment of a person's personality traits and/or characteristics (EU AI Act Article 5 (1) d)). However, there are a number of concerns that can be identified about the effectiveness of its application, at least for the time being, highlighting—according to Jessie Levano—conceptual ambiguities (“profiling” and “assessment of personality traits and characteristics”) and the general exemption for national security purposes.³⁵

5.2. Data in individual cases

In the case of hate crimes, the question of the origin of the ethnic data must be examined primarily from the perspective of the victims (even if group membership is not necessary for the crime to take place, it is enough for the perpetrator to assume that the victim belongs to it). The victims are often not aware at the time of the crime that they are the victims of racially motivated hate crimes. However, the police officer is obliged to follow the protocol³⁶ on the handling of such crimes, which, in addition to the procedure, also contains a list of indicators to help the police officer decide on the appropriate classification of the crime. The aim is to avoid under-classification, for example, classifying an offence committed because of the victim's ethnicity as “mere” assault. Thus, if the police officer in charge perceives that one of the indicators is present, he or she is obliged to investigate the existence of a prejudicial motive³⁷ (which does not itself establish its existence). This was a very important step towards more effective state action against hate crime.³⁸ Since the victim would have to declare specific, sensitive information about

competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA

³⁵ Levano (2024).

³⁶ 30/2019, 18 July ORFK order on the implementation of police tasks related to the handling of hate crimes. For example, point 6: “In front of the persons involved in hate incidents or hate crimes, a police officer shall not make any statement, whether denial or confirmation, as to whether a hate crime has occurred.” or point 7: “The police officer taking action shall communicate with the victim in a calm, objective and professional manner in support of the victim. The police officer shall not display personal value judgements about the victim's behaviour, culture, origin or community and shall refrain from using words and expressions that are stereotypical, prejudiced or that suggest blaming the victim.”

³⁷ Baráth – Füstös (2018).

³⁸ Gyűlölet-bűncselekmények Elleni Munkacsoport: Gyűlölet-bűncselekmény nyomozati protokollt fogadott el a rendőrség [Hate crime investigation protocol adopted by the police]. 19 July 2019. <https://tinyurl.com/939wnu2z>

himself, two questions arise: firstly, what can the police officer ask the victim about ethnicity in order to reveal a bias motive? Alternatively, can he or she record his or her own perception of the victim's membership of a protected group, the presence of characteristics of that group?³⁹ Regarding the first question, the permissive conditional mode does not provide guidance on concrete practice. Police officers in charge have an extremely difficult task in detecting such a crime, so considering when and how to ask this question may be problematic, if only because Act XC of 2017 on Criminal Procedure also stipulates in its Chapter XV on the legal basis for data processing and data protection that "Article 97 (1) The court, the prosecution and the investigating authority may, for the purpose of conducting criminal proceedings, obtain and process all personal data necessary for the performance of their duties as defined in this Act."

It would therefore seem that the legal framework would be in place for a clear formulation, but for the time being the conditional mode is used. As to the second question, the answer is that if the determining authority perceives the presence of such features, that should be indicated in the report, if this is necessary for a proper legal qualification. Alternatively, other indicators of bias may have occurred, leading to a suspicion of bias.⁴⁰ Such a determination of ethnicity is a highly circumstantial issue, as it raises a freedom of self-determination dilemma. Self-determination is defined as follows: "in the broadest sense, it refers to the right of each individual to choose his or her own conception of the good life, and how he or she wishes to live it. The freedom to choose one's conception of the good life essentially implies freedom to choose one's identity, and this is where the problem of ethnicity comes in."⁴¹

The fact is that ethnicity is at the core of human identity, so the decision whether to reveal it must also be up to the individual; this is precisely why ethnic classification based on non-self-definition is problematic. If we remember the notion of ethnicity as formulated earlier, we can see that this is not a question on which an outside observer can take a position. Perception-based classification cannot restrict the free choice of identity, but even if it could, the prohibition of perception-based ethnicity would not be a suitable means of preventing this restriction. Furthermore, Balázs M. Tóth and

³⁹ Gyűlölet-bűncselekmények Elleni Munkacsoport: Útmutató a gyűlölet-bűncselekmények sértettjeinek, egyéb tanúinak kihallgatásához, továbbá a hatóság sértettel kapcsolatos észlelésének jegyzőkönyvezéséhez különös tekintettel az adatvédelmi kérdésekre [Guidelines for interviewing victims and other witnesses of hate crimes, as well as for recording the authorities' findings regarding the victim, with particular regard to data protection issues]. <https://tinyurl.com/5bejf22j>

⁴⁰ Ibid.

⁴¹ M. Tóth – Pap (2012) 244.

Andras L. Pap state that “[t]he harm suffered by the restriction of rights is not disproportionate in the light of the fact that the statistics generated by the collection of data serve precisely to protect the rights of members of a social group whose rights are restricted.”⁴²

6. ORFK Orders

ORFK Order No. 27/2011, 30 December on police measures in a multicultural environment is also related to the conceptual issue of ethnicity and the legal basis for the collection of ethnic data. In the instruction, we can trace the conceptual confusion to which we have already referred, and despite this confusion, we can still read the groups with regard to which the instruction is interpreted. It considers the objectives to be achievable through minority liaison and working groups, and then refers back to the ORFK order on cooperation and liaison between the police and Roma minority self-governments, which seems an interesting solution, as it seems to remove the multicultural environment that was originally the starting point. Although the directive does not single out the Roma, the specific characteristics of Hungarian society suggest that they are most affected.⁴³ What is interesting from a data protection point of view is the “identification of ethnicity.” When mentioning minority communities, the instruction explicitly mentions only the Roma and refugees, but not other minorities or immigrant groups listed in the Act CLXXIX of 2011 on the Rights of Nationalities (Nationality Act). It considers it essential “the existence of a conflict of values between ethnic, religious or other groups or communities’ with different cultural traits, behavioural patterns and values from the majority and the majority society, which is criminal, i.e. to be assessed in the dimension of criminal law (or at least the law of violation of rules).”⁴⁴

From the point of view of the generation and identification of ethnic data, this is interesting because it is able to delimit, on the basis of the aspects indicated (cultural, ethnic, religious traits, etc.), the group that differs from the majority, and if we look at the text as a whole, the naming of the Roma makes this delimitation or identification even clearer. Thus, once again, we see an example of a suggested legal basis for the appearance of ethnic data in the legislative context.

⁴² M. Tóth – Pap (2012) 245–246.

⁴³ Pap (2019) 23–25.

⁴⁴ Pap (2019) 23–24.

7. Concluding remarks

To date, the collection and processing of ethnic data has been the subject of intense debate among experts and, as we have seen, different levels of regulation and different countries are not in complete agreement. The objectives behind data protection are clear and understandable. The weight of historical experience makes it clear to us that the creation of such databases can be dangerous. However, it is worth considering that databases based on other data (for example, on extreme poverty) could also be used to make discriminatory provisions.⁴⁵ In any case, at an international level, various documents have also articulated the need for countries to have information on the situation of minorities in their territories⁴⁶ and, more generally, the need to have the right information available to promote equality and anti-discrimination efforts.

The aim of this chapter was to present the anomalies between theory (regulation) and practice in the Hungarian context. What emerges from the case studies presented is the Murphy's Law of racism,⁴⁷ which aptly captures the problem common to all these cases. A kind of East-Central European phenomenon is the highly contradictory situation in which the perpetrator—if there is a discriminatory intent behind his act—has no definitional problem in determining the identity of his victim's minority group—or indeed the concept of a minority group—but it is the defenders, practitioners and academics who have a difficulty in identifying it.⁴⁸ The extent of the issue is demonstrated by the fact that the phenomenon is not only present in the spectrum of law enforcement work, but is also clearly present in the practice of desegregation litigation.⁴⁹

It should be seen that by banning the collection of ethnic data “we have thrown the baby out with the bath water”⁵⁰. Despite all the good intentions, a counter-productive effect has been achieved: by making the collection of ethnic data subject to such strict rules, the very protective function has not been achieved. The introduction of ethnic data collection has been mooted before: in 2009, the then Data Protection Commissioner (András Jóri) and the Member of Parliament for National and Ethnic Rights (Ernő Kállai) already took the view that it should be introduced for several reasons, notably

⁴⁵ M. Tóth – Pap (2012) 238.

⁴⁶ Kállai – Jóri (2009) 21.

⁴⁷ Pap (2019) 99.

⁴⁸ Pap (2012) 88.

⁴⁹ Pap (2012) 100–104.

⁵⁰ Kerezsi – Gosztonyi (2014) 237.

to help fight discrimination.⁵¹ “The need for data collection is more of a theoretical issue: international documents agree that data collection is an indispensable tool for combating discrimination and for developing truly effective measures and programmes.”⁵²

It could be argued that the rigorous data collection framework imposed by the legislature provides a degree of protection for those who might otherwise face a tension between the rules and the reality on the ground. There is a presumed caution on the part of practitioners, who find it easier to claim that they are acting in accordance with the law and are careful with ethnic data. Therefore, despite the existence of arguments and practical proposals aimed at resolving this tension, the data collection principles previously outlined remain in force for the time being. However, it is crucial to emphasise that collaboration from the grassroots level, including the police and the Working Group Against Hate Crime,⁵³ can also influence the development of legislation and more precise practice.

In conclusion, although the study does not offer solutions to resolve these anomalies, nor does it take a position on the issue of collection/non-collection, but only refers to the professional discourse, the presentation of anomalies that show the clash between “theory” and practice can lead to a further reflection on the issue towards a solution that can ensure legal certainty and adequate access to rights/justice.

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⁵¹ M. Tóth – Pap (2012) 235.

⁵² Kállai – Jóri (2009) 26.

⁵³ Website of Working Group Against Hate Crime (Gyűlölet-bűncselekmények Elleni Munkacsoport): <https://gyuloletellen.hu>

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Races in forensic identification

Abstract. *The concept of human race has become a central theme in recent international forensic discourse, now seen by the science of individualisation as a group measure that can be used in criminal proceedings to help establish the identity of a wanted person or an unidentified corpse. Although genetic studies have for decades undermined the autonomous genealogical existence of human races, the visible components of social races continue to be exploited in practical forensic work. In this chapter, I will examine where forensic science and criminal procedure law draw the boundaries of the concept of race, how they identify its relevant characteristics and how they transform these characteristics into measurable and observable variables in the service of effective crime detection. To this end, I use the new ontological method to show how categorical definitions of human race are linked to forensic identification.*

Keywords: *forensic identification, human race, ontology, DNA phenotyping, familial DNA searching*

1. Introduction

The concept of human race has recently become a central theme in international forensic discourse. One of the most significant manifestations of this, in my view, is the formulation of the “affinity concept,” which seeks to draw the attention of the scientific community to view race as more than just a phenomenon by which different human bodies can be grouped. Just as chemical affinity necessarily binds atoms into molecules, so human race as an object (natural phenomenon)¹ cannot exist without race as a method

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¹ Race as a natural phenomenon allows for the grouping of human bodies according to specific aspects (e.g. geography, genetics and phenotype).

(classification tool)² and race as a theory (ancestry).³ These three aspects of race coexist, interconnect, and recombine, creating something new: the scientific (non-racial) category of race.⁴

The latter is undoubtedly of crucial importance in the field of criminalistics. In the science of individualisation,⁵ specific data on racial origin are nowadays regarded as a group characteristic that can be used in criminal proceedings to help establish the identity of a wanted person or an unknown corpse. Such practices persist despite the fact that genetic studies have for decades undermined the autonomous genealogical existence of human races, thus underlining their social (and not biological) causality. However, since social races often have visible components⁶, they can be used to carry out practical forensic activities and, through them, to enforce the criminal claims of the state.

The legal, political and theoretical definition of race is far from clear. It is a controversial category that is identified in international and domestic legal sources with the perception of physical appearance, thus confusing it with the categories of nationality and ethnicity.⁷ The issue is further complicated by the fact that membership of an ethno-national group can also be defined in different ways. Whether it is self-identification, classification by other members of the group or by outsiders, contemporary national legal systems are reluctant to define membership criteria.⁸

It is from this tension that the sharp critique of forensic identification stems, namely that techniques and technologies that rely on race-based models, through their effective application in practice, ultimately justify and reinforce the false perception in society that represents value for forensics in terms of identifiability.⁹ Indeed, in order to identify the wanted person or the unknown corpse through social races, it is necessary to legally conceptualise and operationalise the labelling system used by the relevant population.¹⁰

² Race as a method helps to reduce the complexity of the phenomenon under analysis by grouping the available samples for a specific research objective (e.g. to identify genes related to facial phenotype and morphology).

³ Race as a theory introduces independent aspects (e.g. evolution, ancestry, mixing) to understand the similarities and differences between the phenomena under study.

⁴ M'charek (2023) 841.

⁵ Kirk (1963) 236.

⁶ Caspari (2023) 105.

⁷ Legislative Decree 8. of 1969. on the Declaration of the International Convention on the Elimination of All Forms of Racial Discrimination, adopted in New York on 21 December 1965, Article 1, Point 1

⁸ Messing – Pap (2024) 1923–1924.

⁹ Czebe (2021) 37.

¹⁰ Sauer (1992) 109.

More precisely, a classification based on the external perceptions accepted by the majority is needed. The question is where forensic science and criminal procedural law draw the boundaries of the concept of race, how they identify its relevant characteristics and how they transform these characteristics into measurable and observable variables in the service of effective crime detection.

2. Ontological approach

Ontology (theory of being), as one of the most important fields of philosophical research, is primarily concerned with the exploration of the structure of being and of concrete beings. The new method of ontology¹¹ generalises over and above the results of constantly changing scientific experience, highlighting the essential properties and their interrelationships specific to a given entity. In every objective being, unique, specific and general determinations (categories)¹² are found, which presuppose each other with mutually different distributions of properties, thereby foregrounding the role of specificity. The new ontological method therefore takes intellectual and social experience as an objective and verifiable category, thus complementing always limited scientific empiricism.¹³ The aim of the categorical analysis in this chapter is to show how the categorical definitions of human race relate to the forensic identification of the wanted person or the unidentified body.

2.1. The foundation of human race

The foundations of human race are the outwardly visible characteristics of ancestry (phenotypes). Race was initially used to denote a grouping of non-human life based on ancestry, but by the 18th century, the term was

¹¹ The old ontological method, which prevailed from Aristotle to Scholasticism, sought to transcend empirical reality by assuming a universal in things, giving them a form from which everything unique could be derived. This method thus presupposed the general as spiritual in nature, starting from a priori concepts and methods. The new ontological method, on the other hand, considers the general determination in things to be revealed by the comparative mind—with analytical procedures, evidence, and conclusions—if and to the extent that it was really a property of the thing (constitution of being).

¹² Category is a philosophical term, which, unlike principles and concepts, are definitions of existence (forms of existence).

¹³ Sziget (2021) 24–26.

widely used to group people with similar morphological characteristics.¹⁴ This categorical view of human morphological variation was greatly aided by the development of navigation, which allowed explorers to land in the New World without having to consider the transitional spectrum of morphological variation.¹⁵

This initial categorisation of humans on the basis of race provided a fertile ground for the emerging field of physical anthropology to study human diversity by defining different races.¹⁶ These initial groupings, of course, ignored the complexity caused by gene flow and natural selection under the conditions of the given era, and therefore, according to Sauer, *Homo sapiens* was basically divided into three major sub-categories: the European (Caucasian), African (Negroid) and Asian (Mongoloid) races.¹⁷ Although there were well-established arguments in favour of the non-existence of biological races in the anthropological community as early as the mid-20th century—and increasing evidence against it from population genetics in the following decades—it remained surprisingly resistant not only in social but also in intellectual experience.¹⁸

Indeed, the non-existent biological categories of human races cannot be effectively separated from the social group of races because of ancestry.¹⁹ Although, by the end of the 20th century, physical anthropology as a discipline had abandoned the biological categories of human race, saying that there are no pure races (genetically homogeneous populations) in the human race, it replaced them with the term ancestry.²⁰ Ancestry is considered to be the aspect of social race that is most important for identity, whether self-identity or socially determined identity. Since social race often has visible

¹⁴ M'charek (2023) 831.

¹⁵ Blumenfeld (2000) 20.

¹⁶ M'charek (2023) 832.

¹⁷ Sauer (1992) 109.

¹⁸ Caspari (2023) 105.

¹⁹ In the past, categories of race were created based on external characteristics (e.g. skin colour, hair type, facial features) that were easily detectable and highlighted by certain social systems and power structures to create and justify differences. These phenotypic differences have been associated with traits, abilities or cultural values that are not in fact biological but social constructs. For example, ethnicity, which became intertwined with the concept of race, especially in societies where both physical appearance and cultural differences were used to justify social hierarchies. However, these two categories cover fundamentally different aspects: while race was originally defined on the basis of phenotypic differences, ethnicity was defined on the basis of shared cultural traits (e.g. language, religion, traditions).

²⁰ Blumenfeld (2020) 21.

characteristics,²¹ it is seen by criminalistics as a group characteristic that can help to identify a wanted person or an unidentified corpse.

2.2. The foundation of forensic science

The foundation of forensic science is individualization. The practical need for the judiciary to be able to use the results of scientific and technical progress to decide, first and foremost, on the main questions of criminal procedure:²² has a crime been committed, and if so, by whom; can it be prosecuted and, if so, how should it be punished? Forensic science does this by specifying the relationship between the objects of identification (identification of origin), which requires special expertise,²³ while criminal procedural law makes this possible by elevating the free assessment of evidence to a principle of guarantee.

Of course, putting the results of scientific and technical progress at the service of crime detection is not the same as mechanically adopting the ready-made knowledge of another science. Forensic science develops new investigative procedures and methods which, although nomothetic (generalising) in nature, aim to promote the idiographic (individualising) cognition of the criminal procedure.²⁴ More specifically, forensic identification is guided by the criminal procedural context of individualisation but considers the phenomenon under investigation to be knowable within the relevant population only to the extent that it can be verified by its measurements.

Initially, forensic identification relied on the external morphological characteristics of the trace, in which the dactyloscopic model of identification clearly became the guiding principle. According to this model, the way to individuate the relationship between the objects of identification (i.e. the sample of unknown origin and the reference sample of known origin) is through the analysis, comparison, evaluation, and verification of the results obtained. At the same time, these theorems of identification theory have stood the test of the development of nomothetic cognition, in particular the ability to investigate the internal, material composition of the trace more deeply, rapidly, and extensively than ever before.²⁵

²¹ Caspari (2023) 105.

²² Fenyvesi (2022) 39.

²³ Kertész (1972) 326.

²⁴ Czebe (2022) 42.

²⁵ Czebe (2020) 17.

The possibility of determining the origin of an object is, of course, made possible by the constantly expanding body of knowledge in the various disciplines that measure the uniqueness, permanence and classifiability of the various objects of identification, which is systematised by forensic science. The main question of these object-specific metrics is ultimately to what extent the identity of the characteristics of the identifying objects is necessary to infer a common origin, with different degrees of certainty, and vice versa: to what extent the dissimilarity of the characteristics of the identifying objects is necessary to exclude a common origin.²⁶

3. Category analysis of final determinacy

In teleology, finite determination has a beginning and an end as opposed to causal: the means chosen for the purpose of consciousness realize the causal process outside consciousness.²⁷ In forensic identification, as I have shown above, individualization is the purpose of criminal procedural law, for which the disciplines that study a wide range of objects of identification develop the techniques and technologies to realize it to a verifiable extent through their measurements.

The difference between idiographic and nomothetic cognition necessarily implies that some tools of forensic identification in themselves only make findings regarding the group and not the individual. Together, however, they can provide even more quantified information for effective individualisation. The decisive factor in all this is the choice of the appropriate tools for the purpose,²⁸ in which not only empirical but also intellectual and social experience is of paramount importance.

3.1. The specific is unique when viewed from the general

Forensic anthropology has essentially put the skeletal analysis techniques of physical anthropology at the service of crime detection, which is primarily aimed at determining the age, sex, body type and race of corpses and corpse parts of unknown identity. The assessment of these categories is based on extensive research on the relationship between the living and their skeletons, and the prediction of race, where identifiability is possible, reflects a high

²⁶ Katona (2002) 149.

²⁷ Szigeti (2021) 186.

²⁸ Hartmann (1970) 41.

degree of accuracy.²⁹ With the development of optical techniques, forensic anthropology has extended its investigation in this direction to include microscopic hair analysis. However, these analyses cannot be interpreted as a justification of the traditional concept of race. They are merely predictions, based on morphology, of the likelihood that the person in question was assigned a particular label by society when he or she was alive.³⁰ The value of these findings must be treated in their proper context.³¹

The individualisation of the origin determination necessarily requires the determination of the group dimensions of the reference sample. After all, it is not practical to make all members of the population concerned the subject of forensic identification. In order for forensic science to be able to fulfil its task of determining the origin within the framework of nomothetic cognition, it must narrow down the range of identification objects to a group that can be handled in terms of realisation³². There have been a number of recent innovations in the use of group measures in forensic science, of which the most relevant for my topic are familial DNA searching and DNA phenotyping.

In traditional DNA-based identification, a DNA profile of unknown origin is compared with a DNA profile of known origin. However, these two innovations aim to find a group measure for the situation where the traditional method does not produce a hit³³ in the detection of a crime of major social danger and there is no tangible identifiable object in the criminal proceedings other than the biological sample of unknown origin. Familial DNA searching relies on mass screening and partial or close matches that may indicate a biological relationship between the person in question and a known person in the database, while DNA phenotyping uses marker collections to infer the outward appearance of the person in question, such as geographical origin, hair, iris, and skin pigmentation, as well as facial morphology.³⁴

²⁹ Sauer (1992) 108–109.

³⁰ Blumenfeld (2020) 21.

³¹ Cole (2020) 359.

³² Cole (2020) 351.

³³ A hit is a match or identity of a DNA profile to reference data stored in national DNA databases for law enforcement purposes, based solely on non-coding segments of DNA. The comparison is carried out by automated searches between the Member States of the European Union, within the limits of the relevant national legislation. Unidentified or fragmented DNA samples can also be compared, but the probability of a match is lower. The credibility and reliability of the tests are guaranteed by the strict professional and legal standards for sample collection, storage and processing, as well as by the international quality assurance standards set by the European Network of Forensic Science Institutes (ENFSI).

³⁴ M'charek – Toom – Jong (2020) 806–807.

The techniques and technologies offering group metrics are therefore primarily intended to facilitate the recognition of the group of persons or objects on whose individuals the evidential methods of forensic identification can be applied. In other words, these are methods from which the possibility of identification can reasonably be expected. The specific (phenotype) is unique (group measure) when viewed from the general (nomothetic individualisation): the externally visible characteristics of social races are the unique group measures of the objects of identification, which provide a reasonable opportunity for nomothetic forensic cognition.

3.2. The specific is general when viewed from the unique

At the same time, forensic identification has not only a scientific and technical aspect, but also a normative one. While the law of criminal procedure ultimately determines the normative limits beyond which the matrix of criminal research cannot extend, it is forensic science that develops the most appropriate methods of criminal investigation. However, there can be no rigid distinction between nomothetic and idiographic cognition, because in its practical application, forensic identification necessarily presupposes both: forensic identification can only take place within the framework defined by procedure law.³⁵ Forensic science is therefore essentially a link between the natural and technical sciences and the social sciences.³⁶

From the point of view of my topic, the use of race as a group criterion in forensic science is made possible by the issuing of a warrant,³⁷ or more precisely by the registration of wanted persons,³⁸ which, according to the Law Enforcement Directive, may include special categories of personal data such as racial or ethnic origin.³⁹ The preamble to the Law Enforcement Directive, however, stresses that the use of the term “racial origin” cannot be interpreted

³⁵ Csák (2023) 14.

³⁶ Viski (1960) 94.

³⁷ Act XC of 2017 on the Code of Criminal Procedure, Article 268 (1) c).

³⁸ Act LXXXVIII of 2013 on the wanted persons' registration system and on the search and identification of persons and things, Article 3 (2) c).

³⁹ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, Article 10.

as an acceptance by the European Union of theories that seek to establish the existence of different human races.⁴⁰

However, the category of personal data for the purposes of the Law Enforcement Directive does not only include information on identified persons—i.e. persons within a given group of natural persons who are distinct from the other members of the group—but also any information on identifiable persons.⁴¹ According to the General Data Protection Regulation, a natural person is identifiable if, taking into account a specific method, it is reasonable to assume that he or she can be identified directly or indirectly.⁴² That the methods in question are reasonably identifiable is perhaps best illustrated by the Vaatstra case, which has attracted a lot of attention not only in the international literature but also in the media.

The body of 16-year-old Marianne Vaatstra was found in the area of the Dutch village of Kollum in May 1999. As the murder (throat slitting), which was committed for a despicable purpose (to carry out a sexual offence), took place in the vicinity of a centre for asylum seekers, the authorities were looking for ways to exclude residents, mainly from Iraq and Afghanistan, as potential suspects. The local population, based on the method and purpose of the crime, labelled the unknown perpetrator as belonging to this social race.

The crime samples (hair, blood, and semen) taken from Vaatstra's body, and its immediate vicinity were first subjected to microscopic hair analysis, as traditional DNA identification had failed, which revealed that the samples in question were probably not from a person of African or Asian, but of European origin. This group measure was later further substantiated by the examination of ancestry markers (Y chromosome), which became legal over time: the semen analysis supported the hypothesis that the DNA originated from a man of Dutch or Western European descent with a high probability. The unique group dimensions of the offender's population were finally realised by familial DNA search, which also became part of the legal practice: although the search in the register of DNA profiles did not produce a close match, the biological sample had such rare characteristics in the Dutch population that it was suitable for mass screening.⁴³

⁴⁰ Directive (EU) 2016/680, Preamble paragraph (37).

⁴¹ Directive (EU) 2016/680, Article 3 (1).

⁴² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Preamble paragraph (26).

⁴³ Genetic mass screening will also be carried out in Hungary for serious crimes, in particular crimes against life. This was also the case in 2008 in Kiskunlacháza, where a 14-year-old girl was raped, strangled and pushed into a ditch by the side of the road, half-naked,

The authorities asked men aged between 16 and 60 years living within a 5 km radius of the crime scene (8080 people) to volunteer to provide a biological sample for DNA testing. Almost 90% of the affected Friesian community responded to the request, including Jasper S., a hard-working family man and local entrepreneur, but also an active church member, who remained unsuspected for 13 years until he was accused and convicted through DNA identification, finally bringing the Vaatstra case to a closure in November 2012.⁴⁴

The above events illustrate how intellectual and social experience actively contributes to the development and practical application of techniques and technologies for group measurement. Legislation creates a category of legally relevant cause without which the result of forensic identification cannot be evaluated: what the law does not consider to be a general grouping criterion that can directly or indirectly facilitate identification cannot become the cause of the individualisation required by criminal procedural law. What is not relevant to the detection of a crime is something that cannot be assessed in law.⁴⁵

One of the reasons why it took so long to clarify the Vaatstra case is that Dutch law did not initially consider the outwardly visible characteristics of ancestry as a general group criterion,⁴⁶ and therefore neither the examination of ancestry markers nor familial DNA searching could form a legally relevant basis for individualisation as a consequence. In addition, the authority's work was made significantly more difficult by the pressure that resulted from social stereotypes increased by the unusual circumstances of the crime, and which was further strengthened by the sensationalist media, ignoring all legally relevant facts. However, the cutting of the throat in this case was in fact a strategic move by the perpetrator to divert suspicion to the group of asylum seekers.⁴⁷ The specific (phenotype) is general (group measure) when viewed from the unique (idiographic individualisation): by extending the forensic

and in which the DNA profile of the perpetrator was determined from the red hairs on the victim's hands and the semen contamination on her clothing. As the national criminal database did not match either the personal or the crime scene samples, a genetic mass screening was carried out, which involved the analysis of DNA samples from 110 individuals. This mass screening played a crucial role in identifying and apprehending the perpetrator and helped to reduce ethnic tensions over the murder. For further examples of mass screening in Hungary, see Füredi (2023).

⁴⁴ M'charek – Toom – Jong (2020) 804–828.

⁴⁵ Szigeti (2021) 184.

⁴⁶ Although Hungarian law does not explicitly regulate this issue, it does not impede the use of these innovations: paragraph (2) of Article 18 of 12/2016. (V. 4.) BM Decree allows forensic genetic experts to ultimately answer the question contained in the assignment with the help of DNA markers not specified in the Decree.

⁴⁷ M'charek – Toom – Jong (2020) 804–828.

genetic examination to the definition of race as an externally visible trait, the legislator has generalised the phenotype into a group measure that coordinates procedural actions, including forensic identification.⁴⁸

4. Concluding remarks

To summarise the above, phenotype, as a visible component of social race in forensic identification is a special categorical form that can be both general and unique, as well as unique and general at the same time. Viewed from the outside, it can be considered as a unique group measure from the nomothetic cognition of forensic science, while it can be considered as a general group measure from the idiographic cognition of criminal procedure. From the inside, however, the synthesis of the specific and the general is a new level of quality.

The extreme members (general and specific, or specific and general) interact with each other through the mediation of the middle (specific). In the bottom-up (from the general to the specific) forensic determinacy relation, the dominant feature of the phenotype is the unique group measure, which provides a reasonable possibility for the practical implementation of identification. In the top-down (from the specific to the general) procedural determinacy relation, on the other hand, the dominant factor of the phenotype is the general group measure, which coordinates the forensic determination (the external formal aspect of the phenomenon is captured by the law), thereby offering the possibility of developing new techniques and technologies which can replicate with the greatest possible certainty the identifiability of the visible features of ancestry as a result in practice or in experimental situations (the inner content of the phenomena is revealed by science).⁴⁹

⁴⁸ In the Vaatstra case, a microscopic analysis of the morphological characteristics of the hair first led to the conclusion that it was probably from a person of European origin. This process can be considered as indirect phenotyping, because information derived from the hair structure was used to infer the origin of the hair. Later, the DNA from the semen sample was analysed for markers of ancestry and shown to be most likely from a Dutch or Western European male. This step can be considered as genetic phenotyping, as the DNA provides ancestry information which also delineates the geographic origin of the perpetrator, confirming the previous findings of the microscopic examination. Finally, the identification of the perpetrator was led by genetic mass screening of the Friesian community, exploiting the rare characteristics of the unknown DNA profile. Although the aim of the mass screening is clearly to identify, the methodology is closely related to phenotyping, as the results of previous analyses were used to define the target population for the screening. Thus, while phenotyping information has enabled identifiability, genetic mass screening has enabled identification in this case.

⁴⁹ Tremmel (2006) 45.

The procedural determinacy that emerges from the forensic determinacy first becomes decisive (as we have seen in the case of forensic anthropology), and then reasserts the forensic determinacy at a new qualitative level (in the form of forensic genetic analysis). In other words, the concept of race as conceptualised by criminal procedural law is operationalised by forensic science. The role of “gatekeeper” is thus shared between the legislators and forensic scientists. The Vaatstra case is a good illustration of this, in which the group dimensions probabilistically determined by microscopic hair analysis were given substance by new criminal determinations based on genetic testing following procedural objectification.

In effect, therefore, the criminal procedural determinacy is a reflection of its own basis: conceptualisation operationalises, and operationalisation conceptualises. As I mentioned above, there is no possibility of a rigid demarcation between them, because the practical application of forensic identification necessarily presupposes both: forensic science develops the most appropriate methods of criminal procedure, but in doing so, it cannot go beyond the normative framework set by criminal procedural law. Respect for fundamental rights is an essential element of the fairness of criminal proceedings under the rule of law. The restriction of fundamental rights in this area is possible only if the conditions laid down by law are fulfilled, and only if the procedural rules laid down by law are complied with, taking into account necessity and proportionality. The relationship between the phenotype as a unique criminal group measure and the phenotype as a general procedural group measure is therefore like that between content and form: content creates and maintains form; form differentiates and develops content. Their transition into one another is a self-reproductive condition in which the movement of mutually exclusive and mutually presupposing moments does not eliminate the contradiction but gives it form.⁵⁰

Forensic identification is the movement in which this contradiction of phenotype is realized, but also resolved, because the new form of phenotype thus created has the best chance of persisting for a longer or shorter period of time and becoming the basis for a new regulation, from which new specific types of phenotypes can evolve. The legitimacy of race in forensic identification is therefore ultimately a legislative recognition of the fact that the prediction of these special personal data, using the results of scientific and technical progress, can reasonably be expected to lead to the identification of a wanted person or an unknown corpse.

⁵⁰ Szigeti (1984) 209.

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Not-so-symbolic issues in recognizing and accomodating ethno-religious identity: Religious symbols and clothing in educational institutions in the practice of the UN Human Rights Committee and the European Court of Human Rights

Abstract. *A state's attitude towards the wearing of religious symbols inevitably determines the possibilities for social integration of religious minority groups, who can be identified not only by their religion but also on the basis of their skin colour, cultural traditions and possibly their mother tongue. Amongst them women are in an especially delicate situation. Although a state's approach to the wearing of religious symbols or clothing, which can be identified as an outward manifestation of religious freedom, may depend on a number of factors, international human right standards and the decisions and recommendations of international human rights fora, including the European Court of Human Rights and the UN Human Rights Committee, play an important role in defining and standardising the acceptable margin of appreciation of the individual states. This study analyses the practice of these human rights fora concerning religious symbols, with special focus on the field of education, pointing out significant differences in their jurisprudence, which may lead to further divergence of standards of acceptable bans of religious clothing and symbols.*

Keywords: *clothing, ECHR, HRC, identity, religion, symbols*

1. Introduction

Human rights law and especially minority protection law habitually operate with the concepts of race, ethnicity and nationality when setting forth standards for the recognition of individual or collective minority rights, the protection from discrimination or the right to reasonable accomodation. While ethnic, language and national minorities each enjoy distinct legal protections, religious minorities are often intersectional, as they often are also ethnic/racial or language minorities,¹ mingling these attributes into a specific,

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¹ Stausberg – Van Der Haven – Baffelli (2023) 6.

intersectional quality and sometimes, also identity. Religious minority groups can often be identified by their appearance, including specific clothing and religious symbols. Therefore, in today's diverse Europe, the wearing of religious symbols is an increasingly important issue. In recent years, Judeo-Christian symbols have been challenged in a variety of contexts at international human rights fora, as have symbols (including attires that cover the entire face or body) of the Muslim communities,² which make up around 4% of Europe's population. The intersectionality of external manifestations of religious belief, and in particular the wearing of Muslim religious symbols cannot be overlooked. When a Muslim woman is discriminated against³ because of wearing a headscarf (or other traditional head covering or dress), discrimination typically involves three elements: religion, gender and (real or perceived) national/ethnic origin, which are linked together to form a complex discrimination ground that can have a decisive influence not only on the social integration of the persons directly concerned, but also of entire generations.

School is undoubtedly one of the most important venues and "training grounds" for social interaction, particularly in multicultural states with diverse populations. Undeniably, in addition to their primary function of imparting knowledge, educational institutions are also centres of socialisation. The inherent and unavoidable interactions between children of different religions and origins and their teachers, both in the classroom and in extra-curricular activities, result in a self-evident familiarity and acceptance of cultures and religions. This most probably has a greater impact on the social behaviour and attitudes of the generations that grow up than any subsequent, consciously acquired "direct" knowledge.

A state's approach to the wearing of religious symbols or clothing, which can be seen as an outward manifestation of religious freedom, may depend on a number of factors. It depends on the constitutional system of church-state relations, the concept of neutrality adopted by the state in question,⁴ and the historical role and importance of religion in the given state. It is also related to the position of the state's aspirations on the scale of a diverse,

² *Eweida and Others v. the United Kingdom* (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) Judgement of 15 January 2013 Final 27/05/2013 (*Eweida*-case), <https://tinyurl.com/5e4hbfzj>; Judgment of the Court (Grand Chamber) of 14 March 2017. Case C-157/15. *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, <https://tinyurl.com/3r7tyc4t>; *S.A.S. v. France* (Application no. 43835/11) European Court of Human Rights Grand Chamber Judgement of 1 July 2014, <https://tinyurl.com/yjdjfur8>

³ Donegan (2020); Aytar – Bodor (2021).

⁴ Czizle (2021).

pluralist or “colourless” or even explicitly “monochromatic” society, and on how it values religious and cultural diversity.

The state’s attitude towards the wearing of religious symbols inevitably determines the possibilities for social integration of minority groups, who can be identified not only by their religion but also on the basis of their skin colour, cultural traditions and possibly their mother tongue. Amongst them women are in an especially delicate situation. A recent study in Flanders showed that a grand majority of muslim girls/woman will look for another place to study or work at if the place they would have chosen in the first place did not accept their wearing the headscarf—even if that means turning down a dream job.⁵ This is why it is of particular importance that public decisions on this issue are framed in terms of human rights, stipulated on constitutional level and by international law, in particular the right to freedom of conscience and religion and the prohibition of discrimination. The decisions and resolutions of international human rights fora, including the European Court of Human Rights (ECtHR) and the UN Human Rights Committee, play an important role in defining and standardising these frameworks. In the following, I will review and analyse the relevant human rights instruments and the practice of these bodies.

2. The right to wear religious symbols in the European Convention on Human Rights and in the relevant human rights instruments of the UN

The wearing of religious clothing and symbols is generally seen as an outward manifestation of religious freedom. According to Article 9 of the European Convention on Human Rights (ECHR) everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change one’s religion or belief and freedom, either alone or in community with others and, in public or private, to manifest a religion or belief, in worship, teaching, practice and observance.

Freedom of conscience and religion thus includes both the fact of holding a religious or other belief (*forum internum*) and the right to publicly express one’s religious beliefs (*forum externum*), as defined in the text of the Convention and in the case law of the ECtHR.⁶ It is important to note that the public display of religious symbols is protected under the freedom of religion,

⁵ Van de Graaf (2021).

⁶ *Eweida*-case 80–82.

regardless of whether the display of the symbol in question is required by the binding rules of a particular religion or not.⁷

However, the protection provided by the ECHR is not absolute: according to Article 9 (2) of the Convention, freedom to manifest one's religion or beliefs "shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." This enumeration of legitimate aims is strictly exhaustive and—unlike with other human rights—does not include national security interests among the legitimate aims of the restriction. This is no coincidence—the Convention considers pluralism of religious beliefs to be one of the foundations of democratic societies, in which the state has no right to interfere, or only a very limited and controllable right.⁸

The Court also examines the necessity and inevitability of the restriction—mere justification or usefulness is not sufficient in this respect, the restriction must serve a "pressing social need". Nevertheless, as will be seen below, the Court grants the States Parties to the Convention a certain margin of appreciation in assessing the necessity of a restriction, particularly in the case of educational institutions.

Article 18 of the United Nations Universal Declaration of Human Rights stipulates that everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change one's religion or belief, and freedom, either alone or in community with others and, in public or in private, to manifest one's religion or belief in teaching, practice, worship and observance.

The International Covenant on Civil and Political Rights (ICCPR), adopted pursuant to the legally not binding Declaration, clarifies and gives binding force to the human rights declarations set out by the latter. The UN Human Rights Committee (hereinafter "the Committee") which also deals with individual complaints, plays an important role in the context of the ICCPR. Although its opinions (unlike those of the ECtHR) are not legally binding, they are undoubtedly relevant to determining whether a particular law or measure is in conformity with the principles laid down in the Covenant.

The ICCPR stipulates the right to freedom of religion and beliefs as follows. According to Article 18. (1), this right shall include freedom to have or

⁷ *Eweida-case; Hamidovic v. Bosnia and Herzegovina* (Application no. 57792/15) 5 December 2017 Final 05/03/2018, <https://tinyurl.com/mu9cft4>

⁸ European Court of Human Rights. Guide on Article 9 of the European Convention on Human Rights. Freedom of thought, conscience and religion. Updated on 31 August 2020, 34, <https://tinyurl.com/yn4v24y9>

to adopt a religion or belief of one's choice and freedom, either individually or in community with others and in public or private, to manifest one's religion or belief in worship, observance, practice and teaching. As the Committee sets out, in their General Comment No. 22, the observance and practice of religion or belief may include not only ceremonial acts but also such customs as—among others—the wearing of distinctive clothing or headcoverings.⁹

According to Article 18 (2) of the ICCPR, no one shall be subject to coercion that would impair the freedom to have or to adopt a religion or belief of choice. According to General Comment No. 22, not only the threat of physical force or penal sanctions, but also policies or practices having the same intention or effect, such as those restricting access to education, medical care, and employment are inconsistent with Article 18 (2).¹⁰

The possible grounds for restricting the expression of religious belief are defined in the ICCPR in the same way as in Article 18 (3) of the ECHR: "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." In General Comment No. 22 the Committee observes that Article 18 (3) is to be strictly interpreted: "restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition."¹¹

It is important to add that, according to the Committee, even the fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the right to freedom of religion of others,

⁹ Human Rights Committee General Comment No. 22 (48) (art. 18) 27 September 1993 CCPR/C/21/Rev.1/Add.4. 4, <https://tinyurl.com/44tfwwhf>

¹⁰ Human Rights Committee General Comment No. 22. 5.

¹¹ Human Rights Committee General Comment No. 22. 8.

nor in any discrimination against adherents of other religions or non-believers.¹²

Also of relevance to the wearing of religious symbols and clothing is General Comment No. 28,¹³ which addresses the issue of specific clothing requirements for women in the context of gender equality, bearing in mind the intersectionality of the issue. It stresses that such requirements may be in breach of further provisions of the ICCPR (e.g. non-discrimination or freedom of expression) as well. This Comment also states that States Parties should take measures to ensure that freedom of conscience and religion is guaranteed to women and men equally and without discrimination, both in law and in practice. According to General Comment No. 34,¹⁴ clothing may also be assessed in the context of freedom of expression, and thus fall within the scope of protection of Article 19, which guarantees the freedom of expression.

In the context of the wearing of religious symbols, the UN Special Rapporteur on freedom of religion and belief laid down general criteria and guidelines in 2006¹⁵ to help States to develop their rules on religious symbols. The complex set of indicators lists legislative and administrative actions that most probably will not be compatible with international human rights standards. For example, the case when the restriction “is intended to or leads to either overt discrimination or camouflaged differentiation depending on the religion or belief involved” is considered as an “aggravating indicator.”¹⁶ So is the case when limitations on the freedom to manifest a religion or belief for the purpose of protecting morals are based on principles deriving exclusively from a single tradition; when exceptions to the prohibition of wearing religious symbols are, either expressly or tacitly, tailored to the predominant or incumbent religion or belief; or when no due account is taken of specific features of religions or beliefs.

The Special Rapporteur also listed circumstances that would make the restriction in question likely to be in conformity with fundamental rights. Examples include cases when the interference is crucial to protecting the

¹² Human Rights Committee General Comment No. 22. 9.

¹³ Human Rights Committee General Comment No. 28 Article 3 (The equality of rights between men and women) (Replaces general comment No. 4) Adopted: 29 March 2000, <https://tinyurl.com/czzbsetf>

¹⁴ Human Rights Committee General Comment No. 34 Article 19: Freedoms of opinion and expression (Geneva, 11–29 July 2011), <https://tinyurl.com/49smhv6k>

¹⁵ United Nations Economic and Social Council, Civil and Political Rights, Including the Question of Religious Intolerance Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir. Commission On Human Rights Sixty-second session 9 January 2006. E/CN.4/2006/5. 55–59, <https://undocs.org/E/CN.4/2006/5>

¹⁶ Ibid. 55.

rights of women, religious minorities or vulnerable groups; or proportionate restrictions on permitted headgear for ID photographs appear to be legitimate, if reasonable accommodation of the individual's religious manifestation are foreseen by the state.¹⁷

The Special Rapporteur also recommended that policymakers should consider, among other aspects, whether there is a risk that the ban could reinforce religious intolerance or stigmatize a particular religious community.

3. Wearing religious symbols in the practice of the ECtHR and the Committee

Taking into account that the ECHR and the ICCPR both define the freedom of religion with essentially the same content, and that both instruments specify the legitimate aim of its restriction in a narrower and more limited way than in the case of other fundamental rights, it is particularly interesting to see to what extent the Court's and the Committee's practice in relation to the display of symbols in educational institutions shows similarities and differences.

3.1. Display of religious symbols by students

The ECtHR has ruled on this issue in a number of cases, some of the most important of which—without claiming to be exhaustive—are the following.

In *Leyla Sahin v. Turkey*,¹⁸ the Court held that a secular university could prohibit female students from wearing the hijab because of its effect on other students. The Court considered the prohibition necessary in order to protect the rights and freedoms of others and to maintain public order, because it evaluated that the sight of wearing the hijab could put pressure on other Muslim students and cause them to feel the need to conform. In this decision, the Court nevertheless took into account the wider socio-political context of the case, stressing that in Turkey certain extremist political forces aim to establish a religiously based social order and to impose the wearing of religious symbols on the population as a whole. A similar ruling was made¹⁹ in

¹⁷ Ibid. 58.

¹⁸ *Leyla Sahin v. Turkey* (Application no. 44774/93) 29 June 2004, <https://tinyurl.com/5592bjvu>

¹⁹ *Köse and Others v. Turkey* (Application no. 26625/02) 24 January 2006, <https://tinyurl.com/yjmbv433>

the case of Turkish secondary school pupils who claimed, among other human rights, that their freedom of religion was violated because they were only allowed to wear their Islamic headscarves in religious studies classes.

The UN Human Rights Committee has however taken the opposite view in the *Hudoyberganova*-case.²⁰ The complaint concerned the expulsion of a university student from Uzbekistan from her college, and subsequently from university, for wearing an Islamic headscarf in defiance of the general rule that students should not wear religious symbols.

The Committee pointed out, with reference to General Comment No. 22, that the prohibition of religious clothing could lead to a violation of Article 18 (2) of the ICCPR. According to this provision, any measure or practice having an effect equivalent to coercion as regards the exercise of religion, including restrictions on access to education, is incompatible with the right to freedom of manifestation of religion. Restrictions on freedom of conscience and religion may be imposed only on the grounds and under the conditions laid down in Article 18 (3), which have not been justified in the case. The Committee thus found that the complainant's freedom of religion had been infringed.

In the light of the above, it is not surprising that the two human rights bodies do not share the same position on the French legislation banning the wearing of religious symbols in schools, which has since caused much controversy since its adoption. The 2004 amendment to the Public Education Act prohibits, among other things, the wearing in public schools of any symbol that ostentatiously expresses the religious affiliation of the pupil.²¹

The ECtHR received a number of complaints against France concerning the wearing of religious symbols in schools, where the petitioners wanted to wear both a *keski* (a small turban worn by young Sikh men²²) and a cap to replace the headscarf, but were banned from doing so, which ultimately led to their exclusion from school.

In its decisions rejecting these applications,²³ the Court stressed that the restriction pursued legitimate aims, namely to protect the freedom of others and public order. Since the legislation in question fundamentally affects the system of relations between the State and the churches, in which there are

²⁰ *Raihon Hudoyberganova v. Uzbekistan*, Communication No. 931/2000, U.N. Doc. CCPR/C/82/D/931/2000 (2004). <https://tinyurl.com/y6hzhf9ay>

²¹ Schanda (2004); Szajbély (2004).

²² The *keski* is a small light piece of material of a dark colour, often used as a mini-turban, covering the long uncut hair considered sacred in the Sikh religion.

²³ *Ranjit Singh v. France* (Application no. 27561/08) 30 June 2009; *Jasvir Singh v. France* (Application no. 25463/08) 30 June 2009; *Aktas v. France* (Application no. 43563/08) 30 June 2009.

significant differences in the legislation of the various States, the margin of appreciation of the State is particularly important in this respect. This is especially the case where the wearing of religious symbols in educational institutions is at issue.

The ECtHR, referring to its previous decisions,²⁴ stressed that national authorities have a duty to ensure that the expression of pupils' religious beliefs in school buildings is not ostentatious and does not lead to pressure or exclusion. It also stated that the prohibition imposed in order to enforce the principle of secularism is in line both with the previous practice of the ECtHR and with the fundamental values of the Convention. The Court therefore considered that neither the right to manifest religion nor the prohibition of discrimination had been infringed.

The UN Human Rights Committee however has taken a contrary position, both in general terms in its periodic reports on France and, in a specific case four years after the entry into force of French legislation banning the wearing of religious symbols in schools.

In its fourth periodic report on France, the Committee has expressed concern that the legislation could lead to Jewish, Muslim and Sikh pupils of both primary and secondary school age being excluded from the public education system and only being given the option of private tuition or other home-schooling options, thus excluding them from the possibility of studying with other French children. The Committee considers that *laïcité*, the specific concept of the French secular state, does not require a ban on the wearing of widespread religious symbols such as the *kippa*, the *hijab* or the *turban* and therefore requests the legislator to review the legislation in the light of Articles 18 and 26 of the ICCPR, i.e. the right to freedom of religion and the prohibition of discrimination.²⁵ The Committee also emphasized in its fifth periodic report on France the view that these laws infringe the freedom to express one's religion or belief and that they have a disproportionate impact on members of specific religions and on girls. The Committee expressed concerns that the effect of these laws on certain groups' feeling of exclusion and marginalization could run counter to the intended goals.²⁶

The Committee had to take a stand in the case of a young Sikh man, *Bikramjit Singh*, who had been expelled from a secondary school in France

²⁴ *Dogru v. France* (Application no. 27058/05) 4 Décembre 2008; *Kervanici v. France* (Application no. 31645/04) 4 Décembre 2008.

²⁵ Concluding observations on the fourth periodic report of France. Human Rights Committee Geneva, 7–25 July 2008 CCPR/C/FRA/CO/4. 23, <https://tinyurl.com/3rc62uvy>

²⁶ Concluding observations on the fifth periodic report of France. Human Rights Committee 17 August 2015 CCPR/C/FRA/CO/5. 22, <https://tinyurl.com/55y8tyvt>

for refusing to take off his *keski*.²⁷ The petitioner claimed that his right to privacy and his right to practise his religion had been violated, and that he had suffered discrimination in connection with those rights.

The Committee pointed out that wearing the *keski* is a religious duty and is also tied in with a person's identity. It is undoubtedly a religiously motivated act, and its prohibition can therefore be considered a restriction on religious freedom. In considering the legality of the restriction, the Committee examined whether it was in accordance with the conditions laid down in Article 18 (3) of the ICCPR. The Committee accepted France's argument that the legislator was motivated by constitutional principle of secularism (*laïcité*) to protect the religious freedom and, in some cases, the physical safety of others. The legitimate aim of the legislation is therefore to protect the fundamental rights of others, public order and public security. However, in the specific case, the necessity and proportionality of the restriction could not be established: the State party has not furnished compelling evidence that, by wearing his *keski*, the specific complainant would have posed a threat to the rights and freedoms of other pupils or to order at the school. Moreover, the expulsion as a sanction was disproportionate and led to serious effects on the complainant's right to education. The exclusion of the complainant therefore did not meet the requirements for the restriction of rights under Article 18 (3) and the complainant's freedom of religion was therefore infringed.

The divergence of the standards of the two human rights fora is even more important considering the fact that the ban on religious symbols and dress in French public schools has been expanding further. In August 2023, the Minister of Education and Youth stated that in addition to previously forbidden symbols, wearing the *abaya*²⁸ or *qamis*²⁹ in state schools also qualified a conspicuous manifestation of religious affiliation prohibited by the law of 2004. The Conseil d'État refused to suspend this circular,³⁰ as in their view, it did not raise serious doubts as to the legality of the act. The Conseil d'État stated that it did not appear that the wearing of the *abaya* or *qamis* in

²⁷ *Bikramjit Singh v. France*, Communication No. 1852/2008 (UN Doc CCPR/C/106/D/1852/2008, 2013) Views adopted by the Committee at its 106th session (15 October–2 November 2012), <https://tinyurl.com/2s4d6r7x>

²⁸ *Abaya* is a long piece of clothing that reaches to the ground, covering the whole of the body except the head, feet, and hands, worn by some Muslim women.

²⁹ The *qamis* is a long tunic worn by some Muslim men that descends to just above the ankles or at the level of the calves. It is worn in different ways according to the traditions of each country.

³⁰ Conseil d'État N° 487896, ECLI:FR:CEORD:2023:487896.20230925, Inédit au recueil Lebon. Lecture du lundi 25 septembre 2023, <https://tinyurl.com/252kevak>

state schools was inaccurately described as a conspicuous manifestation of religious affiliation.

3.2. Display of religious symbols by teachers, in classrooms and in the content of education

It is not possible to discern throughout Europe a uniform concept of the significance of religion in society, and therefore, the meaning or impact of the public expression of a religious belief will differ. In the practice of the ECtHR, in the public sector, and especially in schools, which have a significant impact on the personal development of young generations, the “symbol-free” appearance may be a legitimate expectation at the margin of appreciation of the state, with reference to the principle of neutrality of the state or of the public services.³¹

In the *Dahlab*-case, the ECtHR pointed out that the prohibition of wearing the Islamic headscarf during instruction by persons teaching “young children” in the public education sector is, as a general rule, justified and proportionate to the aim of protecting the rights and freedoms of others and of public order and security; accordingly, it is “necessary in a democratic society.” In reaching its decision, the ECtHR took into account the fact that teachers are representatives of both the education system and the State, and that the symbols they wear may have a potentially proselytising effect on students. The ECtHR also emphasised the age of the pupils as a factor to be considered in this context, taking into account the greater potential for influence on younger children. In addition, the ECtHR did not see any justification for finding gender discrimination, referring to the fact that the prohibition of wearing religious symbols under the legislation in question also applies to men.³² The ECtHR came to a similar decision in the *Kurtulumus*-case,³³ where the issue was the wearing of a headscarf by a university lecturer, i.e. there were no minors or persons of influence involved.

Although the following cases did not concern the display of religious symbols by teachers, two further cases from the ECtHR’s practice, the *Lautsi* case

³¹ European Court of Human Rights. Guide on Article 9 of the European Convention on Human Rights. Freedom of thought, conscience and religion. Updated on 31 August 2020. 94, <https://tinyurl.com/yn4v24y9>

³² *Dahlab v. Switzerland* (Application no. 42393/98) 15 February 2001, <https://tinyurl.com/5exknj69>

³³ *Kurtulumus v. Turkey* (Application no. 65500/01) 24 January 2006, <https://tinyurl.com/yapr66yt>

and the *Perovy* case, which both relate to the circumstances and content of education, are worth referring to in this context.

In the *Lautsi*-case,³⁴ the Court had to rule on the practice of putting a crucifix on the walls of Italian school classrooms. At first glance, in the light of the above judgments, the decision in this case is somewhat surprising. The Court considered the crucifix to be acceptable because it was part of the country's tradition. It stressed that the mere fact that a religion is given a greater prominence in the school curriculum because of its major historical role does not in itself entail the violation of the requirement of neutrality. The crucifix on the wall is essentially a passive symbol, which cannot be equated, for example, with the obligation for all children to practise Christian religious rites. The Court also considered the fact that, in addition to the mere presence of the crucifix, there was no compulsory religious education in schools, Italian schools allowed other religious communities to celebrate their religious events, any religious education could be freely organised in schools and the wearing of any religious symbol in schools was also allowed. In this judgment, the Court therefore expressly authorised the display of a religious symbol on traditional grounds, provided that it was done in an open, religiously neutral environment and did not exclude other religions or their symbols and rituals.

In the *Perovy*-case,³⁵ the ECtHR however reached a surprising conclusion³⁶ compared to the above. In that case, the petitioners complained that their seven-year-old son, who was starting first grade, had been forced to participate in an Orthodox religious ceremony (the blessing of the classroom) at the beginning of the school year, in which, in addition to merely observing the ceremony, the boy of a different religion would practically have been forced to engage in active behaviour, if he had not explicitly refused to actively participate in the ceremony (kissing the crucifix)—but because he refused to do so, he was compelled to express his religious beliefs. The decision of holding the ceremony was made by the parents' community, with the consent of the school, but on this occasion the parents of the child concerned were not present and neither were they and other absent parents informed of the decision. After the ceremony, the complainant was bullied by his schoolmates, causing him great stress and distress. The Court pointed out in the context of the case that, in addition to the fact that the national authorities had acted

³⁴ *Lautsi and Others v. Italy* (Application no. 30814/06) Grand Chamber Judgement of 18 March 2011. <https://tinyurl.com/28ce6kbs>

³⁵ *Perovy v. Russia* (Application no. 47429/09) 20 October 2020, Final 19/04/2021, <https://tinyurl.com/4bm6n8wr>

³⁶ Van Soelingen (2020).

properly, the fact that the blessing ceremony was a separate event, limited in time and effect, was not negligible and did not involve indoctrination or coercion. The Court also stressed that pluralism, tolerance and constructive dialogue are indispensable in a democratic state and do not entitle the adherents of any religion to be exempt from experiencing individual or collective manifestations of other religions. In this particular case, the child was not compelled to take an active part in the ceremony, apart from being present. The judges therefore concluded—by a far from unanimous 4:3 majority—that the pupil's right to freedom of religion had not been infringed. This decision, when compared with the relevant case law of the Court, would require a more in-depth analysis beyond the scope of this chapter. However, it is safe to say that the Court departed from the standard set in the Dahlab case, by not even taking into account the age of the child concerned and the extent to which he could be influenced. They failed to do so despite the fact that this was not merely a case of being exposed to the sight of a religious symbol, but one of taking part in or at least observing an active ceremony.

The UN Human Rights Committee reached quite the opposite conclusion of the ECtHR's decisions on teachers and education staff in the *F.A.*-case³⁷ in 2018. The case concerned the dismissal of an early childhood educator from a French private childcare center for refusing to remove her headscarf at work.

Referring to General Comment No. 22, the Committee pointed out that for the Muslim complainant the wearing of a headscarf constituted an expression of her religious belief, therefore the ban imposed on her wearing her headscarf in the workplace constitutes interference in the exercise of her right to freedom to manifest her religion. Consequently, the question arises whether the prohibition of wearing the headscarf is in conformity with the rules on restrictions on freedom of religion, i.e. necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, in which context both the necessity and the proportionality of the measure must be assessed. France has argued that the measure was intended to protect the rights and freedoms of children and their parents, and has relied on ECtHR case-law to argue that the Muslim headscarf is not a passive symbol but a powerful external symbol which can have an impact on impressionable children for whom the institution must provide social stability and a warm, welcoming environment.

However, the Committee did not find the above arguments convincing and did not see sufficient evidence from the State that the wearing of the

³⁷ Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2662/2015 (CCPR/C/123/D/2662/2015) 24 September 2018, <https://tinyurl.com/9zz4ekhh>

headscarf would endanger social stability and a safe and inclusive environment, thereby infringing the rights of children and their parents. The Committee stressed that wearing headscarves could not in itself be considered as a proselytising act. They indicated that it was not clear how a ban on the wearing of headscarves would contribute to the achievement of the childcare center's objectives, nor the way to ensure that the Muslim community would not be stigmatised. They therefore found a violation of the applicant's freedom of religion.

In addition, the Committee found that the ban also resulted in multiple (intersectional) discrimination on grounds of sex and religion.

4. Concluding remarks

The approach of the Court and the Committee, although based on regulations with essentially identical content and even wording, nevertheless leads to different results. It appears that, taking into account the prohibition of discrimination in a substantive way, including the intersectionality of the issue that is particularly relevant for Muslim women, the Committee has developed a consistent jurisprudence that is more vigorous in protecting the fundamental right of religious freedom than the ECtHR. Thus, the UN's legal protection mechanism provides additional protection in terms of substance for persons wishing to express their religious beliefs by wearing symbols in European States.

Stepping a little further from the scope of this study, it is not surprising that the divergence of approaches is not limited to the use of symbols in educational establishments but also extends to other areas. The French legislation on the prohibition of the public wearing of full-face coverings, which has been the subject of much controversy, has not lead to a shared position of the two bodies either.³⁸ While in the SAS-case,³⁹ the ECtHR—after a series of detailed arguments—finally declared the French legislation compatible

³⁸ For diverging interpretations, see: *S.A.S. v. France* (Application no. 43835/11) Grand Chamber Judgement of 1 July 2014, <https://tinyurl.com/2mdu89y7>; Human Rights Committee, *Sonia Yaker v. France*, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2747/2016 (CCPR/C/123/D/2747/2016) 7 December 2018, <https://tinyurl.com/yuetb3bw>; Human Rights Committee, *Miriana Hebbadj v. France*, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2807/2016 (CCPR/C/123/D/2807/2016) 17 October 2018, <https://tinyurl.com/er9wsr29>

³⁹ *S.A.S. v. France*-case.

(and did the same for the Belgian legislation⁴⁰) with Convention, the UN Human Rights Committee ruled in two cases⁴¹ that the application of the rule violated religious freedom. Similarly, there are also cases where, in relation to religious symbols worn on photographs for identity documents, the same petitioner made the same complaints at the ECtHR and the Committee and the two fora came to different conclusions.⁴² That is, the practices of the two bodies consistently differ as regards the wearing of religious symbols in other areas outside the field of education as well.

The picture that emerges from the decisions analysed in this chapter is that the ECtHR usually interprets the Convention in the national context of a given state, recognising the diversity of states parties to the Convention, and thus, placing particular emphasis on the margin of appreciation of the state concerned. However, by doing so, they necessarily relativise the content of freedom of conscience and religion. It is in this relativised human rights context that the panel considers the fundamental rights of the individual, applying a quasi “sliding scale,” a standard that is not consistent in itself, but depends to a great extent of the constitutional, legal and socio-cultural factors of the given state. In relation to the wearing of religious symbols, the Court’s approach to discrimination is rather formalistic, and does not take into account the typical intersectionality of these cases, whereas it is essentially not conducive to a state approach that would resonate meaningfully with the intersectionality of the issue. By comparison, the UN Human Rights Committee’s consideration is much more focused on individual fundamental rights, and thus more constant and less sensitive to the diversity of states obliged to guarantee rights, while showing greater and more consistent sensitivity to the fundamental rights of applicants. The Committee’s substantive, contextualised method of identifying religious and gender-based discrimination specifically resonates with the social complexity of the issue.

The differences that emerge from the decisions of the two fora may partly be explained by the fact that while the ECtHR’s judgments are binding, the Commission’s decisions merely offer guidance to states and serve as a symbolic remedy to the applicant.

⁴⁰ *Dakir v. Belgium* (Application no. 4619/12) Final 11 December 2017, <https://tinyurl.com/2t-5dxbdx>; *Belcacemi and Oussar v. Belgium* (Application no. 37798/13) Final 11 December 2017, <https://tinyurl.com/bdh5m3ha>

⁴¹ Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2747/2016 (CCPR/C/123/D/2747/2016) 7 December 2018, <https://tinyurl.com/yuetb3bw>; Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2807/2016 (CCPR/C/123/D/2807/2016) 17 October 2018, <https://tinyurl.com/er9wsr29>

⁴² Ouald-Chaib (2013).

The question that remains unanswered is whether this significant divergence of the standards of legal protection will persist in the longer term and, if so, what impact that will have on the system of international (and national) legal protection; whether the consistent practice of the UN Human Rights Committee can elevate and adjust the standards of European legal protection in the field of displaying religious symbols. This will have immense consequences to the way Europe will perceive and accommodate or on the contrary, marginalise and estrange the religious minority groups who—due to historical and factual reasons—undeniably have to find their place in the European society.

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